92-1237

Supreme Court, U.S.
FILED
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

PHILLIP LEE HULL, a minor by his natural parents, guardians, and personal representatives, PHILLIP GENE HULL and TANYA LEE HULL, husband and wife,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Stephen C. Wolfe
STEPHEN C. WOLFE & ASSOCIATES
1325 South Main
Tulsa, Oklahoma 74119
(918) 583-8574

Counsel for Petitioner

January 19, 1993

QUESTION PRESENTED

1. Whether the district court, in a case arising under the Federal Tort Claims Act, has the power to order the creation of a "reversionary trust" funded by a money damage award which reverts to the tortfeasor upon the death of the minor tort claimant, even though the only remedy authorized by Congress is money damages?

LIST OF PARTIES

Petitioner:

Phillip Lee Hull, a minor, by his natural parents, guardians, and personal representatives, Phillip Gene Hull and Tanya Lee Hull, husband and wife

Respondent:

The United States of America

Other:

Judith Finn, Guardian ad Litem for Phillip Lee Hull, a minor

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v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Phillip Lee Hull, a minor, by his natural parents and personal representatives, Phillip Gene Hull and Tanya Lee Hull, husband and wife, hereby prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on August 10, 1992.

OPINIONS BELOW

The opinion of the court of appeals is reported at 971 F.2d 1499 (10th Cir. 1992). Copies of that opinion, and the court's order denying petitioners' Motion for Partial Issuance of Mandate and Petition for Rehearing and Suggestion for Rehearing En Banc, are attached to this Petition as Appendix A and Appendix B, respectively. A copy of the Amended Findings of Fact and Conclusions of Law of the federal district court is attached to this Petition as Appendix C.

JURISDICTION

The opinion of the court of appeals was entered on August 10, 1992. On October 22, 1992, the court of appeals denied petitioners' timely Petition for Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1346(b) of Title 28 provides in pertinent part that the "district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred".

Section 2674 of Title 28 provides in pertinent part that the "United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."

STATEMENT OF THE CASE

A Cherokee Indian, Petitioner Phillip Lee Hull ("Lee") was born on June 28, 1987, at the Claremore Indian Hospital in Claremore, Oklahoma. The Claremore Indian Hospital is owned and operated by Respondent United States of America (the "Government"). (See p. A-30).

The Government admits that its doctors were negligent in delivering Lee and permanently injured him as follows: severe hypoxic ischemic encephalopathy (brain damage), cerebral palsy, with spastic quadriplegia, and developmental delay. (See p. A-30).

Although Lee suffers from these extensive injuries, his cognitive abilities remain generally intact. Experts testified that Lee is mildly retarded. They did not rule out the possibility that Lee might go to college.

Lee's parents, Phillip Gene Hull and Tanya Lee Hull, brought an action on behalf of their son for money damages pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. The tort asserted was negligence (as defined by the common law of Oklahoma). (See p. A-29, 30).

The United States District Court for the Northern District of Oklahoma entered judgment in favor of Lee and against the Government for money damages in the following amounts:

$5,527,872.37	Medical services and support
784,717.50	Fund management
1,601,474.00	Lost wages and impairment of earning capacity
250,000.00	Pain and suffering
$8,165,063.87	TOTAL

(See p. A-32-35).

During proceedings of February 4, 1991, which culminated in the establishment of the Irrevocable Trust of

Phillip Lee Hull,[1] the District Court made the following comment:

> [T]he real issue here is what is [in] the best interest of Phillip Lee Hull. If I had the power I would make every dollar awarded reversionary. I'm not convinced that I have that authority under the law . . . . That is, if anything were to happen to Phillip, if he were to die or if he were to be institutionalized . . . . I'm not at all convinced that I can enter such an order.

(p. A-6).

On appeal to the Tenth Circuit, the Government argued that the District Court did have the power to order a fully reversionary trust -- that is, a trust in which all assets remaining in the trust would revert (forfeit) to the Government upon Lee's death. (See p. A-5).

In an opinion filed on August 10, 1992, the Tenth Circuit held that a district court has the inherent power to establish an irrevocable trust in which the entire trust estate reverts to the defendant Government automatically and immediately upon the death of Lee Hull. The Tenth Circuit's opinion did not limit the reverter to damages awarded for future medical care, only. It included a reverter of the entire trust estate which is also comprised of money damages awarded to Lee for Lee's own pain and suffering and lost wages. (See p. A-6-13).[2]

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1 The Irrevocable Trust was established by the District Court on April 11, 1991, filed of record on April 15, 1991, and incorporated into the District Court's April 12, 1991, Amended Findings of Fact and Conclusions of Law. This trust does not contain a provision which causes a reversion to the Government upon the death of Lee Hull. (See p. A-35-49).

2 Upon remand by the Tenth Circuit the District Court ordered the parties to submit an agreed form of trust which provides that trust assets will revert to the Government upon Lee's death. As a consequence, the

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted because the opinion of the Tenth Circuit conflicts, directly or in principle, with decisions of the First, Second, Third, and Seventh Circuits.

Without congressional authorization, the Tenth Circuit has created a new remedy under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. The opinion authorizes district courts to create "fully reversionary trusts" in favor of the Government. (See p. A-7). Such trusts are funded by the Government in amounts that are based upon the money damages awarded to the tort claimant. The assets of the trust would revert to the Government -- that is, to the tortfeasor -- upon the occurrence of certain defined events (e.g., the death of the tort claimant).

The Federal Tort Claims Act contemplates a lump sum payment to a plaintiff, not a "reversionary trust". Section 1346 (b) provides that

> the district court . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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propriety of the "fully reversionary trust" remedy remains an issue of vital interest in the proceeding below.

(Emphasis added). See 2 Lester S. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies §225 at 10-6 & n.14 (1992) (hereinafter, "Jayson"); 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d §3658 at 325 & n.45 (1985).

By authorizing the novel remedy of a "fully reversionary trust", the Tenth Circuit's opinion directly conflicts with the Third Circuit's decision in Frankel v. Heym, 466 F.2d 1226, 1228-1229 (3d Cir. 1972). In Frankel, the Third Circuit affirmed a district court's decision not to establish a fully reversionary trust. Id. at 1228.[3]

The Frankel court held:

> We agree with the district court that in administering the legislation in question a district court should not make other than lump-sum money judgments unless and until Congress shall authorize a different type of award. The relaxation of sovereign immunity is peculiarly a matter of legislative concern, responsibility and policy. If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them . . . . The district

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3 In a footnote, the Third Circuit observed that:

> The obvious advantage of this arrangement [i.e., the reversionary trust] would be to prevent the award, intended as compensation to the injured person, from becoming a windfall to others who would control its use and disbursement.

Notwithstanding the "obvious advantage" of the reversionary trust the Third Circuit held that a reversionary trust was not a proper remedy.

> court also alluded to the continuing burden of judicial supervision that would attend a judgment creating a life trust. This too is a consideration against the government's proposal.

Id. at 1228-29.[4]

The Second Circuit follows the Third Circuit approach. See Andrulonis v. United States, 724 F.Supp 1421, 1519-1520 & n.616 (N.D.N.Y. 1989) (citing Frankel with approval), aff'd in part and rev'd in part on other grounds, 924 F.2d 1210 (2d Cir.), vacated sub nom. New York State Dep't of Health v. Andrulonis, 112 S.Ct. 39, previous op. reinstated after remand, 952 F.2d 1210 (2d Cir. 1991), cert. denied, 112 S.Ct. 2992 (1992).

The Tenth Circuit's opinion also conflicts in principle with the Seventh Circuit's decision in Nemmers v. United States, 795 F.2d 628, 635-36 (7th Cir. 1986). In Nemmers, the Seventh Circuit declined to reduce a damage award rendered to a minor claimant's parents under the Federal Tort Claims Act. The Nemmers court rejected the Government's argument that a high damage award would result in a "windfall" to the guardian of a minor tort claimant. 795 F.2d at 635. The Nemmers court observed that "stingy" awards penalize relatives who contribute to the care of minor tort claimants. Id. at 636. The Tenth Circuit, in contrast, is suspicious regarding the motives and intentions of the tort victim's parents. (See p. A-5, n.2, A-6).[5]

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4 In its opinion, the Tenth Circuit emphasized that the trust agreement in Frankel contemplated "continuing payment". (See p. A-9). The distinction is specious. A right of reversion (in favor of the tortfeasor) is as much a departure from the statute as continuing or installment payments. Both can be lumped together as "novel types of awards". 466 F.2d at 1229.

5 On this point, compare the Tenth Circuit's opinion at p. A-5, n.2 (suggesting that Lee might die at his parents' hands) with the District Court's opinion at p. A-36, that Lee "can obtain his maximum

In Nemmers, the Seventh Circuit observed in dicta that "[a] reversionary trust might be useful when there is great uncertainty about the victim's life expectancy, as in Robak v. United States, 503 F.Supp. 982, 983 (N.D.Ill. 1980), rev'd on other grounds, 658 F.2d 471, 479 (7th Cir. 1981)." Nemmers, 795 F.2d at 636, n.4. Under the Tenth Circuit rule no showing of uncertainty about the victim's life expectancy is necessary to justify the use of a reversionary trust. The Tenth Circuit assumes that "[t]here will almost always be uncertainty about the life expectancy of a severely injured child". (See p. A-12). In contrast, the Seventh Circuit apparently requires the submission of evidence regarding life expectancy or tenuous health status. See Nemmers, 795 F.2d at 636, n.4; Robak, 503 F.Supp. at 983.[6]

The Tenth Circuit's opinion also conflicts in principle with the First Circuit's opinion in Reilly v. United States, 863 F.2d 149 (1st Cir. 1988). In Reilly, the First Circuit approach adopted and endorsed the rule of Frankel v. Heym. According to the Reilly court, a district court's authority to award damages under the Federal Tort Claims Act is limited to "making lump-sum judgments". 863 F.2d at 189. See Jayson §225 at 10-6 and 10-7 & n.13 (discussing the lower court opinion in Reilly).[7]

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development potential in a home environment supplied by his mother and father".

6 There is no evidence of uncertainty regarding Lee's life expectancy. The District Court found that

> Plaintiff Phillip Lee Hull . . . will have a life expectancy of 69.8 years from the time of the trial. This finding is based upon the totality of the expert testimony in the case. The most compelling and persuasive evidence is that Plaintiff, Phillip Lee Hull, will experience a full life expectancy. (See p. A-31).

7 The district court in Reilly observed that

> in the absence of agreement by the parties to structure the future care award, the law leaves the Court with no alternative but to order the payment of a lump sum judgment. Reilly v. United States, 665 F.Supp. 976, 1016 (D.R.I. 1987).

The district court in Reilly did approve a fully reversionary trust, but it was only as a result of an express agreement between the parties. The "plaintiffs" -- including the parents of the minor tortfeasor -- had consented to the creation of the trust. The propriety of the remedy was not appealed. 863 F.2d at 170. In the instant case, Lee's parents do not consent to the creation of an irrevocable fully reversionary trust.[8] As a consequence, Reilly is factually distinguishable. See Reilly, 863 F.2d at 170 (observing that absent a statute or the parties contrary agreement, the Government "must pay the judgment in one fell swoop"); id. at 169, citing Slater v. Mexican Nat'l R.R.Co., 194 U.S. 120, 128, 24 S.Ct. 581, 583, 48 L.Ed. 900 (1904) (Holmes, J.) (court lacked power to substitute lump sum, representing estimated present value of benefits awarded, for periodic

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8 The Tenth Circuit recites that "Lee has consented to a fully reversionary trust through his legal representative, the guardian ad litem". (See p. A-10-11). The Tenth Circuit opinion does not disclose that (i) the guardian ad litem was appointed upon the Government's motion; (ii) the guardian ad litem was appointed over the objection of Lee's parents; (iii) Lee's parents had already commenced proceedings in state court to appoint a guardian ad litem at the time the Government filed its motion; and (iv) the parents, not the guardian ad litem, brought this action for Lee and successfully maintained it, resulting in the money judgment awarded to their son.

The Tenth Circuit does not discuss the limits on the authority of a guardian ad litem to speak for a minor. The guardian ad litem is but an officer of the court. Dacanay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir. 1978).

In its opinion, the Tenth Circuit equates the consent of the guardian ad litem with the consent of the parents. As a matter of law, the natural parents are the guardian of the person of their son, Lee Hull. See Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-1963 (especially the statement of policy in §1902); Oklahoma Indian Child Welfare Act, 10 Okla. State. §§ 40-40.9 (1991); See also Johnson v. Howard, 741 P.2d 1386, 1387-1388 (Okla. 1985) (discussing the policy of the Indian Child Welfare Act of 1978 and the Oklahoma Indian Child Welfare Act --the Indian Child Welfare Act and the Oklahoma Indian Child Welfare Act have as their philosophy the preservation of the Indian family unit).

payments mandated by governing statute).

II. The Tenth Circuit's opinion appears to conflict with the prior decisions of this Court.

The Tenth Circuit seeks support for the creation of an equitable remedy -- an irrevocable fully reversionary trust -- in Kosak v. United States, 465 U.S. 848, 104 S.Ct. 1519, 79 L.Ed. 2d 860 (1984). (See p. A-10). According to the Tenth Circuit, Kosak stands for the proposition that

> courts should decide claims under the [Federal Tort Claims Act] "with justice and equity both the Government and to the claimants") (quoting Report of the Joint Committee on the Organization of Congress)".

(p. A-10).

The Tenth Circuit's reference is to a dissenting opinion in Kosak. The actual quotation from the committee report stands for the propositions (i) that federal courts can decide claims against the Government with justice and equity and (ii) that such claims need not be processed by the Congress by means of "private bills". See Kosak, 465 U.S. at 868, 104 S.Ct. at 1530. Kosak does not hold or intimate that the Federal Tort Claims Act vests district courts with the power to fashion equitable remedies.

In attempting to read broad equitable powers into the Federal Tort Claims Act, the Tenth Circuit disregards important admonitions from this Court. In Indian Towing Company v. United States, 350 U.S. 67, 76 S.Ct. 122, 100 L.Ed.2d 48 (1955), the Court warned that

> when dealing with a statute subjecting the Government to liability for potentially great

> sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

Fully reversionary trusts give the Government an opportunity that is not available to private, non-governmental tortfeasors -- the chance to recoup damage award payments. This Court has consistently recognized that the purpose of the Federal Tort Claims Act is to allow a tort claimant to sue the Government as if the Government were a private individual. See Feres v. United States, 340 U.S. 135, 141, 71 S.Ct. 153, 157, 95 L.Ed. 152 (1950); Dalehite v. United States, 346 U.S. 15, 30, 73 S.Ct. 956, 965, 97 L.Ed. 1427 (1953) (discussing 28 U.S.C. §2674). Inventing a new remedy -- a remedy that is not available to defendants in private tort actions -- does not advance the purposes of the Federal Tort Claims Act and is not consistent with this Court's prior cases.

III. The Tenth Circuit's opinion raises important and unresolved problems.

The Tenth Circuit's opinion raises three additional issues that are "beyond the academic or the episodic". Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). First, the opinion raises a question about a federal court's ability to devise and employ a remedy that was not contemplated by Congress. Theorists and judges have long debated the question of whether Congress's power to regulate federal court jurisdiction is also the power to control remedies. E.g., Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: *An Exercise in Dialectic*, 66 Harv.L.Rev. 1362, 1366 (1953). The problem is particularly acute when the statute in question creates an exception to governmental immunity. See Jayson §225 at 10-7 n.14 (listing recently

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enacted statutes that allow courts more flexibility in remedies).

Second, the problem is frequently recurring. The same issues arise in other cases. E.g., Bean vs. United States of America, United States District Court for the Northern District of Oklahoma, Case No. 92-C-327-E (minor tort claimant born at Claremore Indian Hospital; parents object to appointment of guardian ad litem by federal court on request of the Government). Lower courts need guidance regarding the latitude afforded by the Federal Tort Claims Act. In particular, district courts and courts of appeals need answers to the following questions: Is there only one possible remedy under the statute -- lump sum payment of money damages? Can the district courts create and use equitable remedies not expressly authorized by the statute?

Third, the prestige of the Government is at stake. If the Tenth Circuit approach is allowed to remain in force, the Government will have a right that other tortfeasors do not enjoy. The Government will be able to take back its damage award. In a simpler, more innocent time this sort of usurpation might have been called "Indian-giving". See Tafoya v. City of Alburquerque, 751 F.Supp. 1527 (D.N.M. 1990); United States v. Ahtanum Irr. Dist., et al. 124 F.Supp. 818 (E.D.Wash. 1954).[9]

Lower courts need guidance from this Court as to the remedies available under the Federal Tort Claims Act. In addition, lower courts need guidance regarding a more general question -- the extent to which Congress can statutorily limit the district court's jurisdiction and ability to craft novel remedies.

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9 The "fully reversionary trust" remedy arguable results in a taking of the tort claimant's property. See Richard A. Epstein, Takings: Private Property and the Power of Imminent Domain 41 (1985) (the Federal Tort Claims Act "gives a legislative expression to the constitutional idea by presumptively holding the government liable for its torts on the principles applicable to private defendants").

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CONCLUSION

For these various reasons, this Petition for Writ of Certiorari should be granted. If the Petitioner is correct in urging that the Tenth Circuit lacked the authority to create an equitable remedy under the Federal Tort Claims Act, the matter should be remanded to the District Court for appropriate disposition with an instruction that a "fully reversionary trust" cannot be ordered as a remedy.

Respectfully submitted,

Stephen C. Wolfe
STEPHEN C. WOLFE & ASSOCIATES
1325 South Main
Tulsa, Oklahoma 74119

(918) 583-8574

Counsel for Petitioner

January 19, 1992

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Stephen C. Wolfe
STEPHEN C. WOLFE & ASSOCIATES
1325 South Main
Tulsa, Oklahoma 74119
(918) 583-8574

Counsel for Petitioner

January 19, 1993

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Appendix C — Amended Findings of Fact and Conclusions Law, Phillip Lee Hull v. United States of America, No. 88-C-1645-E (N.D. Ok. April 12, 1991) A-29

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PHILLIP LEE HULL, a minor, by his natural parents, guardians, and personal representatives; PHILLIP GENE HULL and TANYA LEE HULL, husband and wife; PHILLIP GENE HULL, individually; TANYA LEE HULL, individually,	)	No. 91-5091
	)	No. 91-5092
Plaintiffs-Appellees/ Cross-Appellants,	)	
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant-Appellant/ Cross-Appellee,	)	
JUDITH A. FINN, Ph.D., J.D., Guardian ad litem for Phillip Lee Hull	)	
Movant/ Cross-Appellee.	)	

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 88-C-1645-E)

William G. Cole, Attorney, Appellate Staff Civil Division, Department of Justice, Washington, D.C. (Stuart M. Gerson, Assistant Attorney General, Washington, D.C., Tony M. Graham, United States Attorney, Tulsa, Oklahoma, and Barbara C. Biddle, Attorney, Appellate Staff Civil Division, Department of Justice,

Washington, D.C., with him on the briefs), for Defendant-Appellant/Cross-Appellee.

Stephen C. Wolfe, Wolfe & Vogle, P.C., Tulsa, Oklahoma, for Plaintiffs-Appellees/Cross-Appellants.

Judith A. Finn, Ph.D., J.D., Tulsa, Oklahoma, on the brief as Movant/Cross-Appellee.

Before TACHA and EBEL, Circuit Judges, and ROGERS, Senior District Judge.*

EBEL, Circuit Judge.

The parents of a handicapped child brought this civil action for monetary damages against the government pursuant to the Federal Tort Claims Act ("FTCA"). Because the government admitted liability for medical malpractice prior to trial, the district court held a bench trial on the issue of damages only and awarded the plaintiffs over eight million dollars, most of which was to be placed in a trust.

This case primarily raises questions about the computation and structuring of damage payments to a

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*The Honorable Richard D. Rogers, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

handicapped child under the FTCA. Specifically, we address the following issues on appeal: (l) the district court's power to order the parties to place the damages awarded to the handicapped child in a trust that will fully revert to the government upon the child's death; (2) the date on which interest on the award should begin to accrue; (3) whether the guardian ad litem's fees should be considered attorney's fees deductible from the damages award or costs assessed against the government; and (4) the propriety of various damages awarded. For the reasons stated below, we vacate the district court's decision and remand for proceedings consistent with this opinion.

I. FACTS

On June 28, 1987, Phillip Lee Hull ("Lee") was born at the Claremore Indian Hospital in Oklahoma, which is owned and operated by the United States ("the government") . The government admits that its doctors were negligent before and during Lee's delivery. As a result of the doctors' malpractice, Lee received the following injuries: severe hypoxic ischemic encephalopathy (brain damage), cerebral palsy, with spastic quadriplegia, and developmental delay. Lee will require constant aid and therapy for the rest of his life.

In December 1988, Phillip Gene Hull and Tanya Lee Hull ("the parents") brought this civil action on behalf of their infant son and on their own behalf for monetary damages under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680. On behalf of Lee, the parents sought damages for economic losses (including lost wages; lost earning capacity; medical treatment costs; and special housing and transportation costs) and noneconomic losses (including loss of enjoyment of life; mental and physical pain, suffering, and disfigurement, past, present, and future; and permanent disability). On their own behalf, the parents sought damages for pain and suffering; loss of Lee's

household services; and loss or impairment of the aid, comfort, society, and companionship of Lee.

Due to the government's admission of liability and causation, the District Court for the Northern District of Oklahoma held a bench trial for the sole purpose of determining damages. On the government's motion, the court appointed Judith A. Finn as a guardian ad litem to represent Lee's interests.

The court found that, with proper care, Lee would have a normal life expectancy of 69.8 years at the time of trial. On this basis, the court awarded Lee $5,527,872.37 for medical services and support, $784,717.50 for fund management, $1,601,474.00 for lost wages and impairment of earning capacity, and $250,000 for pain and suffering. In addition, the court awarded $150,000 to Mrs. Hull for pain and suffering and $100,000 to Mr. Hull for pain and suffering. In total, the court awarded $8,414,063.87.

The court instructed the government to pay the parents directly for their pain and suffering, but ordered that the damages awarded to Lee be placed into a trust fund managed by a third-party trustee. The record indicates that the court wanted to establish a trust that would revert fully to the government upon Lee's death. Apparently, the court desired such a reversionary provision because it was concerned that Lee's safety would be in jeopardy if his parents were to receive the unspent portion of this damage award upon Lee's death. However, the court believed that it lacked the power to impose a full reversionary provision absent the consent of the parents.

Instead, the court imposed a partial reversionary provision whereby if Lee were institutionalized during his life, any unspent funds remaining from the damage award would be divided at the time of his death as follows: His surviving parents or his estate would receive that percentage of the remaining trust funds obtained by dividing Lee's age at the time of institutionalization by 69.8, his life expectancy at the time of the trial. The remainder of the trust's assets

would revert to the government.[1]

Thus, Lee's parents potentially would receive an economic benefit upon Lee's death to the extent that they chose to provide home care for him rather than to institutionalize him. The district court concluded that Lee would benefit from home care rather than institutional care, and it apparently felt that this provision would give the parents an incentive to provide such care.[2] The parents agreed to this reverter provision.

The government appeals the form of the trust agreement, the date interest began to accrue, the district court's ruling that the government must pay the attorney's

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1A later provision in the Amended Findings of Fact and Conclusions of Law appears to be contradictory, as it suggests that the reverter occurs at the time Lee is institutionalized rather than upon his death. See Amended Findings of Fact and Conclusions of Law at 23-24, App. of Appellants at 67-68 ("The Trust will not be reversionary in the event of Lee Hull's early and untimely death, but is directed by the Court to revert to the United States should Lee ever be placed in an institutional environment. This reversion is to be calculated by subtracting from the total Trust Estate remaining at the time of institutionalization, the cost of Lee's institutional care from that year until he reaches the age of 69.8 years. For example, should Lee be institutionalized at the age of 20, the reversion would be calculated by subtracting from the total Trust Estate the cost of institutional care for 49.8 years."); see also id. at 25, App. of Appellants at 69 ("The Trust will not be reversionary in the event of Lee Hull's early and untimely death, but is directed by the Court to revert to the United States via the formula indicated should Lee ever be placed in an institutional environment.--). Such a provision makes no sense because it would potentially deprive Lee of a portion of his damages for pain and suffering, lost economic opportunities, and the like during his lifetime merely because his parents chose to institutionalize him. Upon remand, this provision should be clarified. The proposed trust document drafted by the parents states more consistently that the trust terminates upon Lee's death and then a portion of the remainder reverts to the government if Lee has been institutionalized. See Government's App. at 21-22.

2However, this provision would not provide an incentive against Lee's untimely death while in the care of his parents. In that event, the entire remaining amount of the damage award would go to the parents and there would be no reverter to the government.

fees of the guardian ad litem as costs, and the amount of the various damage awards. The parents cross-appeal on the grounds that the district court failed to compensate them, or inadequately compensated them, for certain damages. The guardian ad litem, as cross-appellee, argues that it is in Lee's best interest for the trust fully to revert to the government upon his death and that the government should pay her fees as costs. We have jurisdiction to hear these appeals under 28 U.S.C. § 1291.

II. DISCUSSION

A. Form of the Trust

The government and the guardian ad litem argue that the district court should have established a trust that grants a full reversionary interest to the government upon Lee's death. In fact, they suggest that Lee's life may be compromised because the existing trust agreement provides that the parents inherit the entire trust assets if Lee dies while in their care.

During the trial below, the district judge apparently shared this concern and he expressed a desire to award Lee's damages in the form of a fully reversionary trust, whereby any funds remaining in the trust at the time of Hull's premature death would revert to the government. However, the district Judge stated that he was not convinced that he had the power to impose such reversionary conditions on the trust when the parents did not agree to it:

> [T]he real issue here is what is [in] the best interest of Phillip Lee Hull. If I had the power I would make every dollar awarded reversionary. I'm not convinced that I have that authority under the law. If I could, I would make every bit other than the attorney's fee award--that is, all amounts that

> would go into the trust should in my view be reversionary. That is, if anything were to happen to Phillip, if he were to die or if he were to be institutionalized . . . . I'm not at all convinced that I can enter such an order.

Government's App. at 177A; see also Findings of Fact and Conclusions of Law at 8, App. of Appellants at 38 ("Although the Court is firmly convinced that a structured settlement would be in the best interests of both parties' under the prevailing law, the Court cannot order such a settlement."). Accordingly, the Judge granted a reversion to the government upon Hull's death only in the event that Lee was ever institutionalized; if Lee's parents cared for him at home until his death, then they would be entitled to the entire remainder of the trust's assets.

The scope of the district court's authority to specify the form of an award of damages is a question of law, which we review de novo. In re Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (l0th Cir. 1988). For the reasons that follow, we hold that the district court has the inherent power to order the parties to place the money judgment into a fully reversionary trust if such an arrangement is in Lee's best interest. Accordingly, we remand in order to give the court the opportunity to establish a fully reversionary trust if it determines that such a trust is still appropriate. In making this determination, the court should consider that Lee's consent to such a trust, through his guardian ad litem, is a strong indication that the trust is in Lee's best interest.

The relevant jurisdictional statute for suits brought under the FTCA provides that

> the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful

> act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346 (emphasis added).

Some courts have interpreted this provision to require that district courts award only lump sum money judgments in FTCA cases. Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972), appears to be the seminal case on this topic. In Frankel, the court disapproved a proposal whereby a trust was to be established for the benefit of a woman who was permanently disabled by an army vehicle. Under the trust agreement, the government would have been required to supplement the trust from time to time as needed, and any trust funds remaining at the time of the woman's death were to revert to the government. Id. at 1228. The Third Circuit stated that "in administering the [FTCA,] a district court should not make other than lump-sum money judgments unless and until Congress shall authorize a different type of award." Id. at 1228-29. The court justified this rule under two rationales: (1) the federal waiver of sovereign immunity under the FTCA incorporates the traditional common law principle that awards in civil suits must take the form of common law money judgments, id., and (2) lump sum money judgments are preferable to judgments that would impose a continuing burden upon the judiciary to supervise the award, id. at 1229.

Other courts have adopted the rule enunciated in Frankel. Some have done so without any further analysis. See, e.g., Andrulonis v. United States, 724 F. Supp. 1421, 1519-20 n.616 (N.D.N.Y. 1989) ("the FTCA contemplates a lump-sum award, and this court lacks the power to enter judgment in this case 'in terms other than a simple award of

money damages,' and thus cannot mandate the purchase of an annuity or otherwise structure its award") (citations omitted), aff'd in part and rev'd in part on other grounds, 924 F.2d 1210 (2d Cir.), vacated sub nom. New York State Dep't of Health v. Andrulonis, 112 S. Ct. 39, previous op. reinstated after remand, 952 F.2d 1210 (2d Cir. 1991), cert. denied, 112 S. Ct. 2992 (1992). Others have done so only after a detailed analysis of the rule. See, e.g., Reilly v. United States, 665 F. Supp. 976, 1016-17 (D.R.I. 1987) ("in the absence of agreement by the parties to structure the future care award, the law leaves the Court with no alternative but to order payment of a lump sum judgment"), aff'd in part and remanded on other grounds, 863 F.2d 149, 170 (lst Cir. 1988) ('Because the FTCA represents a waiver of the government's sovereign immunity, it is to be construed conservatively. We, therefore, . . . hold that, absent unusual circumstances [such as specific statutory authority], the court below was right in insisting that its award of damages be rendered in lump-sum form.") (footnote and citation omitted).

We agree that courts cannot subject the government to ongoing obligations like the continuing payments proposed in Frankel. However, provided that the government satisfies its obligation up front in one lump sum, nothing in the FTCA prohibits courts from exercising their inherent authority to structure awards or to impose trusts or reverter conditions to ensure that the damage recovery is in the best interest of the victim.[3] Indeed, it would be incongruous for the recovery to place the victim's life in jeopardy. See Reilly, 863 F.2d at 170 ("When a tortfeasor loses at trial, then--absent a statute or the parties' contrary agreement--it must pay the judgment in one fell swoop. After the wrongdoer and its funds have been parted,

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3This approach is consistent with the rationales set forth in Frankel in that (l) the government is paying a lump sum and (2) a properly structured trust managed by an independent trustee does not place a continuing burden on the judiciary.

the focus shifts: it cannot be doubted that the court has power (l) to ensure that the recovery benefits the victim, and (2) to exercise strict supervision over investment and use of the funds if the victim is a legal incompetent or otherwise in need of protection."); see also Kosak v. United States, 465 U.S. 848, 868 (1984) (courts should decide claims under the FTCA "with justice and equity both to the Government and to the claimants") (quoting Report of the Joint Committee on the Organization of Congress).

Thus, we hold that the district court has the inherent authority to order that Lee's damages be paid in the form of a fully reversionary trust if it concludes that is in Lee's best interest, so long as the government's obligation to Lee ceases when it pays a fixed lump sum to fund that trust. In determining whether such a trust is appropriate on remand, the court should consider what form or structure of damages best serves Lee's interests from Lee's perspective only. Thus, the court need not and should not consider whether either the government or the parents assume a risk or whether either might receive a "windfall" upon Lee's untimely death because of the presence or absence of a reverter, as the court did in Reilly, 665 F. Supp. at 1017-20. The award is to compensate Lee, and Lee only. Thus, the possibility that the parents might succeed to Lee's award is not relevant. Similarly, once the amount of the award is calculated fully, but not excessively, to absolve the government of its malfeasance, the possibility of a reverter to the government is not relevant. Both possibilities are only incidental to what must be the only inquiry after the proper amount of the award has been calculated and paid: How should it best be structured to benefit Lee?

The fact that Lee consented to a fully reversionary trust through his legal representative, the guardian ad litem, is a highly relevant consideration because Lee is the real party in interest.[4] Nothing in the language of 28 U.S.C. §

4The government need not consent to the reversionary interest. Sovereign immunity mandates that Congress must agree if novel types

1346 or courts' interpretation thereof prevents the real party in interest from consenting to receive the lump sum judgment in any form, including a reversionary trust. Here, Lee agreed through his legal representative that it would be in his best interest for the government to place his damages, which totalled over eight million dollars, into a fully reversionary trust; in fact, he requested such an arrangement through his legal representative. Because the guardian ad litem--and not the parents--represents Lee, see Garrick v. Weaver, 888 F.2d 687, 692-93 (lOth Cir. 1989), her consent is the relevant consideration. The parents' refusal to consent to a fully reversionary trust is irrelevant, particularly in light of their alleged conflict of interest in this case.

In FTCA cases with similar facts, two district courts have imposed trusts granting a reversionary interest to the government with the consent of the real party in interest. See Robak v. United States, 503 F. Supp. 982, 983 (N.D. Ill. 1980) (fully reversionary trust), aff'd in 'rt and rev'd in part on other grounds, 658 F.2d 471 (7th Cir. 1981), and Reilly, 665 F. Supp. at 1018-19 (limited reversionary trust).

In Robak, the parents of an eight-year-old rubella-syndrome child brought an action in their own names against the United States under the FTCA and received $900,000 in damages. They agreed to place the money awarded to them in a reversionary trust for the lifetime future maintenance of the child. 503 F. Supp. at 983. In addition, they agreed that upon the child's death, all remaining trust proceeds will revert back to the United States in order to prevent any unjust enrichment. Id. The court held without much discussion that such an arrangement was permissible. Id.

In Reilly, the parents of a child who suffered permanent brain damage because of a naval obstetrician's negligence during delivery brought an action against the United States

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of awards are to be permitted against the government, but sovereign immunity does not preclude the government from receiving money back after it has satisfied its lump sum obligation.

under the FTCA and received over $11,000,000 in damages on behalf of the child. 665 F. Supp. at 1008. With the agreement of the parents,[5] the district court established a trust for the future care award, with a reversion in favor of the government in the event the parents choose to institutionalize her. Id. at 1019. If the parents choose to provide her with home care, however, they will receive the trust proceeds upon her death. Id. at 1018-19. This arrangement is similar to the trust agreement approved by the district court in the instant case.

In addition to the two courts that have actually imposed a reversionary trust, the Seventh Circuit has indicated in dicta that a reversionary trust might be appropriate under certain circumstances, such as "when there is great uncertainty about the victim's life expectancy, as in [Robak]." See Nemmers v. United States, 795 F.2d 628, 636 n.4 (7th Cir. 1986). There will almost always be great uncertainty about the life expectancy of a severely injured child.

Ultimately, the district court has the inherent power to ensure that Lee obtains the maximum benefit from his award. Accordingly, we remand to give the district court an opportunity to approve the establishment of a new trust that includes a full reversionary interest to the government if the court still desires to do so. If the court decides a new trust is unnecessary, we ask the court to consider (1) minor changes that might lessen the tension between Lee's interests and the parents' interests (for example, the government suggests that the court might provide the parents with reasonable access to trust funds to pay family expenses); (2) a provision whereby the government will be reimbursed for services that

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5The court's consideration of the parents' consent in Reilly is not inconsistent with our position that the consent of the parents in the instant case is irrelevant. Reilly differs from this case in two important respects. First, the child in Reilly was represented by her parents, not by a guardian ad litem. Id. at 978. Second, the possibility of a conflict between the parents' interest and the child's interest was not an issue in Reilly. Id. at 1019.

the Indian Health Service renders to Lee in the future; and (3) the appointment of a different guardian ad litem, as requested by the current guardian ad litem.[6] The court's decision as to the structure of the award will be reviewable only for an abuse of discretion.

B. Accrual of Interest

Interest is recoverable against the United States only when expressly provided for by statute. Library of Congress v. Shaw, 478 U.S. 310, 314 (1986). 31 U.S.C. § 1304(b)(1)(A) permits the recovery of interest on an FTCA judgment for the period during which the judgment is on appeal: "Interest may be paid from the appropriation made by this section on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance. [emphasis added]" Rule 58 of the Federal Rules of Civil Procedure delineates the requirements for a judgment: "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when [the clerk enters the judgment in the civil docket] as provided in Rule 79(a)."

In its June 5, 1991 Order Nunc Pro Tunc, the district court declared that October 19, 1990--the date on which the court entered its original Findings of Fact and Conclusions of Law, which specified the amount of damages awarded--was the relevant judgment date for purposes of determining when interest on Lee's award began to accrue. On appeal, the government contends (l) that it was by no means clear that the October 19, 1990 findings and

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6On remand, the court may of course reconsider any arguments regarding the provisions of the trust agreement. Indeed, we note that the district court has retained the power to clarify the trust provisions if requested to do so by the trustee or the parents.

conclusions constituted a "judgment" until the district court entered its Amended Findings of Fact and Conclusions of Law on April 12, 1991 and (2) that the June 5, 1991 Order Nunc Pro Tunc-- in which the district court directed the clerk of the district court to "officially enter on its docket the October 19, 1990 Findings of Fact and Conclusions of Law as a judgment" was the first document to meet the requirements of Rule 58.

Because this is a purely legal issue, we review the court's decision de novo. Ruti-Sweetwater, 836 F.2d at 1266. For the following reasons, we conclude that interest on Lee's award began to accrue on June 5, 1991.

First, we agree with the government that it was not clear that the October 19, 1990 findings constituted a "judgment" until the district court entered its Amended Findings of Fact and Conclusions of Law on April 12, 1991, when the district court declared:

> The amended judgment rendered herein does not alter the amount delineated by the Court in its original judgment of October 19, 1990. From that date the total amount of damages has been fixed, certain and final, and was accordingly filed of record with the United States Government Accounting Office by Plaintiff's counsel on October 23, 1990. Therefore, the Court orders that interest should be paid on the total damage award in the amount of 6.26% from October 23, 1990 to date of deposit by Defendant.

Amended Findings of Fact and Conclusions of Law at 24, App. of Appellants at 68. Thus, the parents could not have filed "the transcript of the judgment" required by section 1304 when they filed the court's findings and conclusions with the Comptroller General on October 23, 1990.

In fact, both parties repeatedly evidenced confusion

and requested that the court enter a judgment.[7] Indeed, during a hearing on January 17, 1991, the district court itself indicated that no judgment had yet been filed and declined to enter judgment because of the possibility of a structured award:

> MR. WOLFE [attorney for parents and Lee]: Do we have a final appealable judgment, was that the intent of the Court October the 19th?
>
> THE COURT: . . . [T]he judgment has not been entered at this point. . . . [I]t's my understanding until the judgment itself is entered there is no appeal that can be made. . .

Government's App. at 178-79; see id. at 190.

Second, October 19, 1990 cannot serve as the date of judgment because the district court did not satisfy Rule 58 at that time. The district court's June 5, 1991 Order Nunc Pro Tunc is the first document that satisfies Rule 58.

This Court has strictly applied the separate document rule. See United States v. City of Kansas City, Kan., 761 F.2d 605, 60607 (lOth Cir. 1985); United States v. Clearfield State Bank, 497 F.2d 356, 358-59 (lOth Cir.

7For example, as of November 6, 1990, the government expressed in its "Response to Plaintiffs" Notion to Alter or Amend the Court's Findings of Fact and Conclusions of Law and Request to Enter a Final Judgment Providing for a Structured Award Reversionary to the Government" its belief that the court had not yet entered a final judgment. See Government's App. at 6, 8. In addition, during both the January 17, 1991 hearing and their February 1, 1991 "Motion for Court to Enter Separate Judgments for Plaintiffs and Motion for Court to Bifurcate Trust Proceeding(s) and Brief in Support Thereof," the parents acknowledged the absence of a judgment and urged the court to enter a judgment so that interest could commence. See id. at 12, 14-15, 179, 183, 187, 189.

1974) ("Rule 58 applies where it is uncertain whether a final judgment has been entered, as where a trial judge writes an opinion or memorandum providing only the basis for the entry of judgment, but containing apparently directive or dispositive words such as "defendant's motion for summary judgment is granted." In such a situation, a judgment must be set out on a document separate from the opinion or memorandum.").

The parents erroneously construe Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) (per curiam), to preclude the application of Rule 58 for purposes of determining when post-judgment interest begins to accrue. In Mallis, the Supreme Court determined that the Court of Appeals appropriately assumed jurisdiction under 28 U.S.C. § 1291 despite the district court's failure to satisfy Rule 58 because the parties waived the separate judgment requirement. The parents focus upon the statement in Mallis that "the sole purpose" of the separate document requirement of Rule 58 "was to clarify when the time for appeal . . . begins to run. Id. at 384. They ignore, however, the legislative history cited immediately after this statement, which indicates that the Advisory Committee intended for Rule 58 to eliminate uncertainties regarding the commencement of time "for post verdict motions and for the purpose of appeal. Id. at 385. We reject the parents' narrow construction of Mallis because the opinion as a whole reveals that the drafters of Rule 58 intended to clarify the time that judgment was entered, whether for purposes of calculating the time for appeal or for other purposes where certainty as to the date of judgment is important.

In a case decided prior to Mallis, we held that Rule 58 precluded us from awarding interest prior to the entry of formal judgment. Millers' Nat'l Ins. Co. v. Wichita Flour Mills Co., 257 F.2d 93, 104 (lOth Cir. 1958). In Millers', we applied Rule 58 and declined to accrue interest on the date of a verdict when there was a two-year delay in the entry of formal judgment because the statute authorizing interest in

that case, 28 U.S.C. S 1961, authorized interest only from the date of entry of the judgment. Id. The interest statute involved here, 31 U.S.C. § 1304, similarly requires a judgment before the interest can begin to accrue. We hold that Millers' remains good law even after Mallis.

A number of circuits similarly have applied Rule 58 subsequent to Mallis to determine the date of judgment for purposes of calculating accrual of interest. See e.g., In re Red Carpet Corp,. 902 F.2d 883, 893-94 (11th Cir. 1990); Marshall v. Perez-Arzuaga, 866 F.2d 521, 523 (lst Cir. 1989). Other circuits, however, have declined to apply Rule 58 to determined when interest begins to accrue on a judgment, not on the basis of Mallis, but because the purpose of post-judgment interest statutes is to protect a successful party from losing the value of his or her award during the time that the award is contested. See e.g., Poleto v. Consolidated Rail Corp., 826 F.2d 1270, 1280-81 (3d Cir. 1987); Merrill Lynch Pierce Fenner & Smith Inc. v. Knudsen, 749 F.2d 496, 497-98 (8th Cir. 1984); Turner v. Japan Lines Ltd., 702 F.2d 752, 756-57 (9th Cir. 1983). Accordingly, where the district court did not enter formal judgment promptly, these courts have held that interest should begin to accrue on the date of the verdict or award. Thus, it appears that these courts have adopted an equitable definition of "judgment" for purposes of awarding post-judgment interest.

The precedent in our Circuit precludes us from adopting such an approach. See Millers', 257 F.2d at 104. Furthermore, in this case we are dealing not with the general interest statute, 28 U.S.C. § 1961, but rather with the specific statute that allows interest to be recovered against the government, 31 U.S.C. § 1304(b)(1)(A). Because waiver of sovereign immunity is always construed narrowly, Shaw , 478 U.S. at 318, we must give the term "judgment" the narrow definition supplied in Rule 58.

The parents next contend that the parties have waived the separate document requirement if Rule 58 is

applicable. We disagree. This requirement is deemed waived if

> [1] [T]he District Court clearly evidenced its intent that the opinion and order from which an appeal was taken would represent the final decision in the case. [2] A judgment of dismissal was recorded in the clerk's docket. And [3] [the party against whom the appeal was taken] did not object to the taking of the appeal in the absence of a separate judgment.

Mallis, 435 U.S. at 387-88 (bracketed numbers added). These prerequisites are not satisfied in the instant case; in fact,[8]

The district court's June 5, 1991 Order Nunc Pro Tunc is the first document that meets the requirements of Rule 58. The government concedes in its brief that this order satisfies the requirements of 31 U.S.C. § 1304(b)(1)(A) even though it was never filed with the Comptroller General; the parents did file the original and the amended Findings of Fact and Conclusions of Law, both of

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8It is not enough, as the parents contend, that the district court retroactively satisfied the first two prerequisites through its June 5, 1990 Order Nunc Pro Tunc. The court's intent at the time it issued the original Findings of Fact and Conclusions of Law is controlling, and, as discussed supra, the court itself stated on January 17, 1990 that no judgment had yet been entered. If the Mallis waiver requirements could be satisfied retroactively as the parents suggest, a court could theoretically prevent an appeal by declaring that it intended to enter judgment long before it actually did so such that the period in which to appeal would have already expired.

Furthermore, the waiver rule set forth in Mallis appears to be geared toward situations in which an oversight results in a deviation from Rule 58 and compliance with the requirements of Rule 58 is never really at issue. In this case, the deviation from Rule 58 was clearly not an oversight and the date of the entry of judgment was an ongoing issue in the litigation.

which were discussed in the Order Nunc Pro Tunc. See Brief for Appellant, Cross Appellee United States of America at 22-23.

Accordingly, we reverse the district court's determination that interest began accruing on October 23, 1990 and remand for the court to recalculate the accrued interest from June 5, 1991.

C. Fees of the Guardian Ad Litem

The district court ordered the government to pay for the costs of the guardian ad litem pursuant to Federal Rule of Civil Procedure 54(d), which provides that "costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law."' See Amended Findings of Fact and Conclusions of Law at 25, App. of Appellants at 69. The government argues on appeal that the fees of the guardian ad litem should be deducted from the damages awarded to Lee pursuant to 28 U.S.C. § 2678 ("Attorney fees--) because the guardian ad litem acted as an attorney. We remand for the district court to separate that portion of the guardian ad litem's fee that should be considered attorney's fees from that part that should be considered costs consistently with the following discussion.

"Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees." Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983). "[W]e must construe waivers strictly in favor of the sovereign and not enlarge the waiver "beyond what the language requires."" Shaw, 478 U.S. at 318 (citations omitted). 28 U.S.C.§ 2678 provides the sole authorization for attorney's fees in FTCA actions. This section permits attorney's fees of up to 25 percent of the judgment to be taken from the judgment itself.

Whether payments to the guardian ad litem should be taxed as costs pursuant to Rule 54(d) or deducted as attorney's fees from the judgment pursuant to 28 U.S.C. §

2678 depends upon the role that the guardian ad litem plays. To the extent the guardian ad litem acts as an officer of the court, looking after the interests of the minor, compensation is taxable as costs. To the extent the guardian ad litem performs legal services as an attorney, compensation should be deducted as attorney's fees. See DuPont v. Southern Nat'l Bank, 771 F.2d 874, 882-83 (5th Cir. 1985) (distinguishing between guardian ad litem and attorney ad litem and holding that only expenses of guardian ad litem are taxable as costs), cert. denied, 475 U.S. 1085 (1986); Franz v. Buder, 38 F.2d 605, 607 (8th Cir. 1930) ("Where the services as guardian ad litem and as an attorney are rendered by the same person, a separate allowance should be made for each service; the amount allowed for services as guardian ad litem being taxable as costs and the amount allowed for services as counsel fees assessable against the estate of the incompetent."); cf. Schneider v. Lockheed Aircraft Corp., 658 F.2d 835, 854-55 (D.C. Cir. 1981) (legal research and analysis expenses of guardian ad litem taxed as costs when performed on behalf of court rather than in course of representing infant).

In this case, the parents argue that the fees for the guardian ad litem's services can in no way be considered attorney's fees for purposes of section 2678 because the court appointed her over the parents' objections and she often argued against the parents' interests. We reject this argument because, as established supra, Lee is the primary real party in interest in this case, and it appears that the guardian ad litem performed some legal services on his behalf.

The government contends that the guardian ad litem denominated many of her claims for compensation as attorney's fees. Specifically, the government asserts, the "Application of the Guardian Ad Litem For Attorney Fees and Expenses" includes charges for various legal services, such as "trial preparation, preparation for and attendance at depositions, preparation of motions, and trial of the lawsuit."

See Reply Br. for Appellant, Cross Appellee United States at 12. Unfortunately, we cannot evaluate the government's assertion because it failed to include this application as part of the appellate record. Accordingly, we must remand for the district court to examine that application and to determine what portion of the guardian ad litem's compensation was properly taxed as costs and what portion should have been deducted from the damages award as attorney's fees.

D. Specific Items of Damages

1. Adequacy of Damages Awarded For Home Health Aide Services

The parents contend that the district court awarded an insufficient amount for the cost of Lee's home health aide services. During the trial, the parties presented conflicting evidence as to what services would be required. We cannot say that the court's decision to adopt the recommendation of the government's expert was clearly erroneous.

2. Government's Claim That The District Court Did Not Properly Adjust The Damages Awards to Present Value

The government contends that the district court (l) improperly failed to adjust portions of the award for future damages to present value and (2) improperly adjusted the award for lost future earnings by using a negative discount rate.

In calculating damages, the trier of fact should discount awards for future damages to present value to

account for the effects of investment, but the effects of inflation should also be considered, and, with regard to wages, other factors may need to be considered that may reasonably lead to a projection of increased wages over time. See Hoskie v. United States, 666 F.2d 1353, 1355-56 & n.2 (lOth Cir. 1981); Steckler v. United States, 549 F.2d 1372, 1378 (lOth Cir. 1977). See generally Jones & Lauahlin Steel Corp. v. Pfeifer, 462 U.S. 5231 532-47 (1983) (analyzing methods of computing damage awards and selecting discount rate in the context of the Longshoremen's and Harbor Workers' Compensation Act).

Some courts have sought to avoid the complexity of such computations by assuming that investment interest and inflation rates will normally have a fairly fixed relationship to each other so that a pet discount rate may be used that merely reflects the rate by which investment interest normally will exceed inflation. This is also referred to as the real rate of return that an investor receives. Although some courts have assumed parity between investment interest and inflation, e.g. Barnes v. United States, 685 F.2d 66, 70 (3d Cir. 1982) (applying zero discount rate as part of "total offset" method, whereby investment interest rates and inflation rates are presumed to be equal and to cancel one another out), most courts assume that the net discount rate will be in the range of one to three percent. E.g. Doca v. Marina Mercante Nicaraauense. S.A., 634 F.2d 30, 39-40 (2d Cir. 1980) (fixing discount rate at two percent unless litigants offer evidence to the contrary), cert. denied, 451 U.S. 971 (1981); Trevino v. United States, 804 F.2d 1512, 1519 (9th Cir. 1986) (extending to FTCA case Supreme Court's statement in Pfeifer that a trial court should not be reversed "if it adopts a rate between 1 and 3% and explains its choice," 462 U.S. at 548-49), cert. denied, 484 U.S. 816 (1987). Whether a net discount rate is used or actual investment interest and inflation figures are used, the basis of the computation must be explained and supported by competent evidence.

The government asserts that the district court failed to discount portions of Lee's future damages awards to present value. We agree that nothing on the face of the court's Findings of Fact and Conclusions of Law reveals that the court discounted the awards as required to reflect present worth. The parents argue that the court obviously used the offset method of computing present value and assumed a zero net discount rate; therefore, no adjustment was necessary. Because the court's choice of a discount rate has a significant effect upon the amount of damages awarded, we decline to make such an assumption, especially given the court's use of a non-offsetting method in computing lost future earnings and given the fact that a zero discount rate ordinarily will not reflect economic reality. Accordingly, we remand for the district court to make appropriate findings of fact explaining its method of calculating present value for all awards for future damages except lost future earnings.

On remand, the district court should bear in mind that Steckler precludes a mechanical application of the offset approach. See 549 F.2d at 1378. In Steckler, we adopted the rationale of United States v. English, 521 F.2d 63 (9th Cir. 1975), wherein the Ninth Circuit rejected the offset doctrine in an action under the FTCA. That court stated: "[T]he court may not assume that the discount rate and the inflation rate will net to zero. The lower court must first estimate future income and expenses, taking into account estimated changes in the purchasing power of the dollar, and then discount this future net income stream to its present value.N Id. at 75. Thus, the offset approach is appropriate in this Circuit only if the court uses competent evidence to calculate the interest rate and the inflation rate and they happen to be equal and therefore to cancel each other out.

We affirm, however, the present value calculation of Lee's lost future earnings. Although the district court did not make specific findings of investment interest rates, inflation

rates, and predicted growth in wages, the plaintiffs' expert did address these factors in his testimony of the present value of Lee's lost future earnings. Because the district court adopted the figure proposed by this expert, we may conclude that the district court also adopted the expert's methodology.9 Specifically, the plaintiff's expert used a discount rate of 1.64 percent, which took into account both inflation and the investment interest rate. However, he also applied a 3.29 percent "growth rate" to Lee's projected earnings, which represents Lee's estimated annual increase in earning power--beginning at age 20--without considering inflation. The expert then concluded that Lee's earning power, in terms of present value, would increase 1.65 percent (3.29 - 1.64) each year.

We review the district court's choice of a discount rate under a clearly erroneous standard. See Hoskie, 666 F.2d at 1356. Although some courts have generally disallowed the use of a growth rate factor in the estimation of lost future income, see, e.g., McCarthy v. United States, 870 F.2d 1499, 1503 (9th Cir. 1989); Cunningham v. Quaker Oats Co., 107 F.R.D. 66, 79 (W.D.N.Y. 1985), we cannot say that the district court's decision to rely upon expert testimony utilizing this methodology constitutes clear error. The Supreme Court recognized this approach in Pfeifer, 462 U.S. at 548, and the parents' expert provided the court with a detailed basis for his calculation. Accordingly, we affirm the $1,601,474.00 award for lost wages and impairment of earning capacity.

3. Fund Management Award.

The government also asserts that the district court's

9By contrast, the district court did not adopt this expert's recommended present value calculations for the other future damages awards. Therefore, we may not assume that the court adopted the expert's methodology for those awards.

award of $784,717.50 for fund management--i.e., remuneration for the trustee--is excessive. "The standard for determining whether an award of damages is excessive is whether the award shocks the judicial conscience." Miller v. United States ex rel. Dep't of the Army, 901 F.2d 894, 897 (lOth Cir. 1990). Because the trustee has a significant amount of responsibility to ensure Lee's continuing welfare, we cannot say that this award is so excessive as to shock the judicial conscience.

4. Miscellaneous Other Damage Items As To Which There Are Inadequate Findings

Finally, the parents argue that the district court erred in failing to award damages for specialized adaptive housing; personal services rendered by Mrs. Hull; housekeeping services required by Lee; lost household services; physical disability and disfigurement; past medical expenses; psychological counseling; and dental expenses. They allege that the existence of these damages was established at trial, leaving only the amount of damages to be determined by the court.

"It is a fundamental legal principle that the determination of the quantum of damages in civil cases is a fact-finder's function." Bennett v. Longacre, 774 F.2d 1024, 1028 (lOth Cir. 1985). Thus, the fact that the parents presented some evidence regarding the above damages during the trial is not determinative. The court was entitled to discount this testimony based upon its observation of the witnesses and its assessment of their credibility.

However, the district court's power to determine damages is not without constraints. Federal Rule of Civil Procedure 52(a) requires the district court to make a finding of fact to justify its decision to award, or not to award, damages. See Nemmers, 795 F.2d at 634-35 (where parents

brought medical malpractice action against the government to recover damages arising from the delivery of their child, district court's statement that "[t]he Court declines to award compensation for 'quality of life' considerations" was deemed to be an insufficient finding of fact under Rule 52(a)).

With the exception of the claim for psychological services, see Findings of Fact and Conclusions of Law at 6, App. of Appellants at 36, the district court did not mention these damage claims in its original or amended Findings of Fact and Conclusions of Law. Accordingly, although we can find support in the record or at law for the district court's failure to award certain of these damage claims and the court may have concluded that other of these damage claims were subsumed in the large damage awards that were given, we remand for the court to enter appropriate findings of fact or conclusions of law to support its decision denying damage claims for specialized adaptive housing; personal services rendered by Mrs. Hull; housekeeping services required by Lee; lost household services; physical disability and disfigurement; past medical expenses; and dental expenses.

III. CONCLUSION

The decision of the district court is VACATED and REMANDED for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PHILLIP LEE HULL, a minor, by his natural parents, guardians, and personal representatives; PHILLIP GENE HULL and TANYA LEE HULL, husband and wife; PHILLIP GENE HULL, individually; TANYA LEE HULL, individually,	)	
Plaintiffs-Appellees Cross-Appellants,	)	Nos. 91-5091 /91-5092
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant-Appellant/ Cross-Appellee,	)	
JUDITH A. FINN, Ph.D., J.D., Guardian ad litem for Phillip Lee Hull,	)	
Movant-Cross-Appellee		

JUDGEMENT
Entered October 22, 1992

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges, and ROGERS*, Senior District Judge.

*The Honorable Richard D. Rogers, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of plaintiffs-appellees/cross-appellants' motion for partial issuance of the mandate and petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the motion and the petition for rehearing are denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

The mandate shall issue forthwith.

Entered for the Court

ROBERT L. HOECKER, Clerk

By:
Patrick Fisher, Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIP LEE HULL, a minor, by his natural parents, guardians and personal representatives, PHILLIP GENE HULL AND TANYA LEE HULL, husband and wife, and PHILLIP GENE HULL, Individually, and TANYA LEE HULL, Individually, Plaintiffs,	)
vs.	)No. 88-C-1645-E
UNITED STATES OF AMERICA, Defendant.	)

AMENDED
FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

NOW on this 11th day of April, 1991 comes on for hearing the above styled case and the Court, being fully advised in the premises finds that this case was tried to the Court without a jury April 2 through April 13, 1990. Upon consideration of all the evidence in the record, arguments of counsel and controlling statutory and case law, the Court enters its Findings of Fact and Conclusions of Law.

1. This is a civil action brought by Phillip Lee Hull, a minor, by his natural parents, guardians and personal

representatives, Phillip Gene Hull and Tanya Lee Hull, husband and wife, on his behalf and on their own behalves against the Defendant, United States of America, under the terms and provisions of the Federal Tort Claims Act. The action is one for monetary damages by reason of negligence.

2. All Plaintiffs at the time of the events complained of were and are now residents of the Northern District of Oklahoma. The medical malpractice charged against the United States occurred at the Claremore Indian Hospital, Rogers County, within the Northern District of Oklahoma. Claremore Indian Hospital is owned and operated by the United States of America through the Indian Health Service of the Public Health Service of the U.S. Department of Health and Human Services.
3. Administrative claims were submitted by Plaintiffs to the U.S. Public Health Service on January 28, 1988. The parents claimed, in their individual capacity, damages of $7.5 million each and on behalf of their son, a minor, Phillip Lee Hull, damages in the amount of $15 million. There was no final administrative determination made by Defendant during the statutory six month period. Plaintiffs filed this civil action on December 22, 1988.
4. On December 5, 1989 the Defendant filed an admission of liability which left the amount of damages to be awarded to Plaintiffs as the only remaining issue for trial.
5. The admitted negligence of the Defendant directly caused the following injuries to the Plaintiff Phillip Lee Hull: severe hypoxic ischemic encephalopathy, cerebral palsy, with spastic quadriplegia, and developmental delay.
6. Based upon the Defendant's negligence, Plaintiffs claim the following damages:

A. Phillip Lee Hull: economic losses, including lost wages, lost earning capacity, costs of medical treatment and costa of special housing and transportation; and non-economic losses consisting of loss of enjoyment of life, mental and physical pain, suffering and disfigurement, past, present and future, as well as permanent disability.

B. Each of the parents claims loss of household services of the minor, and loss or impairment of the aid, comfort, society and companionship of the minor.

7. Plaintiffs Tanya Lee Hull and Phillip Gene Hull were married on August 28, 1986. Their respective ages were 19 and 24.

8. Tanya Lee Hull received her prenatal care through the Indian Health Services. Phillip Lee Hull was born at Claremore Indian Hospital on June 28, 1987.

9. Plaintiff Tanya Lee Hull received injuries in the delivery of Phillip Lee Hull by reason of the negligence of the United States.

10. Plaintiff Phillip Gene Hull was present during the birth of his son and immediately thereafter.

11. Plaintiff Phillip Lee Hull is a white male having a life expectancy of 69.8 years from the time of the trial. This finding is based upon the totality of the expert testimony in the case. The most compelling and persuasive evidence is that Plaintiff, Phillip Lee Hull, will experience a full life expectancy.

12. By reason of the negligence of the Defendant, Phillip Lee Hull will require extraordinary medical services and support. The Court determined that the following expenses are to be reasonable and necessary without regard to any potential increase in the cost of the services to be rendered in the future, custom housing which will be necessitated in the future when Phillip Lee Hull reaches that point in his

development when he can use an adaptive wheel chair, replacement wheelchairs, and replacement customized vans throughout the life time of Phillip Lee Hull so long as he is not institutionalized:

A. Physical Therapy:

(a) Until age 21 - 1 hour, 3 x per week at $75.00 per hour; $225 per week x 52 = $11,700 per year x 18 years = $210,600 - 16 weeks ($3,600) =

$207.000.00

(b) Age 21 to 45 - 1 hour, 1 x week at $75 per hour; $75 x 52 = $3,900 per year x 24 years =

$93.600.00

(c) Age 45 to 69.8 - 1 hour, 2 x per week at $75.00 per hour; $150 x 52 = $7,800 per year x 24.8 years =

$193,440.00

Physical Therapy Total = $494.040.00

B. Occupational Therapy:

(a) Until age 21 - (see Physical Therapy (a) above) =

$207 000.00

(b) Age 21 to 45 - (see Physical Therapy (b) above) =

$93,600.00

(c) Age 45 to 69.8 - (see Physical Therapy (c) above) =

$193,440.00

Occupational Therapy Total =

$494,040.00

C. Speech Therapy:

(a) Until age 21 - (see Physical Therapy (a) above) =

$207.040.00

(b) Age 21 to 45 - (see Physical Therapy (b) above) =

$93,600.00

(c) Age 45 to 69.8 - (see Physical Therapy (c) above) =

$193.440.00

Speech Therapy Total = $494,040.00

D. Nursing: 6 hours per month at $50.00 per hour = $300 per month = $3,600 per year; To age 4 = $2,400 [8 months]; From 69 to 69.8 [$3,600 x .8] = $2,880; From 4 to 69 = 65 x $3,600 = $234,000 + $2,400 + $2,880

Nursing Total = $239,280.00

E. Nutritionist:

(a) Until age 21 - 52 hours per year at $40.00 per hour = $2,080 per year; To age 4 = 36 weeks x 40 = $1,440; 17 years at $2,080 = $35,360 + $1,440 = $36,800;

(b) Age 21 to 69.8 - 12 hours per year at $40.00 per hour = $480 per year; From 21 to 69 = 48 x $480 = $23,040; From 69 to 69.8 = $384 + $23,040 = $23,424;

Nutritionist Total = $60,224.00

The Court does not find compelling evidence that would justify a finding of need for psychological services for Lee, his mother or father, and therefore declines to make a finding of such being medically necessary.

F. Case Management: $200,000.00 to last over

the course of Lee's lifetime.

G. Physicians and Hospitals:

(a) Pediatrician - 8 visits per year at $80.00 per visit = $640 per year; To age 4 = 8 months/12 months = .67 x $640 = $428.80; To age 69 = 65 x $640 = $41,600; To age 69.8 = .8 x $64¤ = $512 + $41,600 + $428.80 =

$42,540.80

(b) Orthopedic Consultation - 3.5 visits per year at $87.50 per visit = $306.25 per year; To age 4 = .67 x $306.25 = $205.19; To age 69 = 65 x $306.25 = $19,906.25; To age 69.8 = .8 x $306.25 = $245 + $19,906.25 + $205.19 =

$20.356.44

(c) Inpatient Hospitalizations - -$500,000.00 to last over the course of Lee's lifetime.

(d) Ophthalmological - $200.00 per year; To age 4 = $200 x .67 = $134; To age 69 = 65 x $200 = $13,000; To age 69.8 = .8 x $200 = $160 =

$13.294.00

(e) Medication - $30.00 per month for the rest of his life = $360 per year; To age 4 = $30 x 8 = $240; To age 69 = 65 x $360 = $23.40; To age 69.8 = .8 x $360 = $288 =

$23.928.00

(f) Inpatient Physician Expenses based on a calculation of $187.50 per year; To age 4 = .67 x $187.50 = $125.63; To age 69 = 65 x $187.50 = $12,187.50; To age 69.8 = .8 x $187.50 = 150 =

$12.463.13

H. Therapy Aide: $2,121,790.00 to last over

the course of Lee's lifetime;

I. Fund Management: $784,717.50 to last over the course of Lee's lifetime;

J. Therapeutic Equipment, computers and switches: $661,933.00 to last over the course of Lee's lifetime;

K. Adaptive wheelchair: $22 ,167 . 00;

L. Customized vehicle and periodic equipment: $79, 530 . 00 for van; $48,246.00 for van maintenance.

M. Lost Wages and impairment of earning capacity in the amount of $1,601,474.00.-

N. Plaintiffs have established through competent evidence that because of Defendant's negligence they have suffered and are entitled to money damages for pain and suffering in the following amounts:

Lee Hull	**$250,000.00**
Tanya Hull	**$150,000.00**
Phillip Hull	**$100,000.00**

Paragraphs A through N above establish that Plaintiff Phillip Lee Hull's damages amount to $8,164,063.87, with Tanya Hull ' s damages of $150,000.00 and Phillip Hull's damages of $100,000.00. Interest must be calculated upon the entire sum of $8,414,063.87 at the rate of 6.26% per annum from October 19, 1990 to date of deposit. The total of Phillip Lee Hull's damages of $8,164,063.87 plus interest as delineated above, less attorney fees to be paid, the Court orders to be placed in its entirety in an irrevocable trust. The Trust shall contain a possibility of reverting in favor of the United States of America for the reasons and subject to the conditions stated herein. This amount irrevocably placed in trust for the lifetime of

Phillip Lee Hull together with all future interest earned on that amount or any portion of that amount by the Trust represents the net portion of the total damages awarded to provide for the care and support of Phillip Lee Hull.

The amounts designated for Tanya and Phillip Hull may be paid to them via the channels normally designated for successful plaintiffs in personal injury actions. The Court finds that the sums payable to Lee Hull, however, must be placed in the Trust fund on behalf of Lee Hull.

The Court finds from the evidence that Phillip Lee Hull can obtain his maximum development potential in a home environment supplied by his mother and father. The Court further finds that institutionalization of Phillip Lee Hull is not in his best interest from both a physical and intellectual developmental basis. Accordingly, the Court has determined that it should take all steps which it may, pursuant to the law, to encourage the parents of Phillip Lee Hull to maintain and nurture him in a family home environment. The Court is mindful of the fact that this will be a difficult undertaking on the part of the parents of Phillip Lee Hull. The Court further realizes that the parents may determine at some point in the future that they are not able, either physically, mentally or emotionally, to cope with the stress occasioned by maintaining Phillip Lee Hull in a home environment and may be forced to cause Phillip Lee Hull to be institutionalized. Knowing this, The Court has determined that all sums to be awarded Phillip Lee Hull shall be placed in an irrevocable trust, with a possibility of reverting in favor of the United States of America, on behalf of and for the care, support, and

maintenance of Phillip Lee Hull and to encourage the continuation of an in-home environment for Phillip Lee Hull. The parties have prepared and the Court contemporaneously approves a Trust Agreement which, among other things, provides as follows:

A. The purpose of this Trust is to provide medical services, care, support, adaptive wheel chairs, customized motor vehicles, customized housing and to the extent possible, to maximize the mental and physical development and welfare of Phillip Lee Hull. To this end, the Trustee may make such payments for the benefit of Tanya Lee Hull and Phillip Gene Hull for their health, support maintenance and welfare, as long as Tanya Lee Hull and/or Phillip Gene Hull are providing Phillip Lee Hull with a home environment, as the Trustee deems necessary for the benefit of Phillip Lee Hull. The Trustee shall not make any payments to or supply any benefit for Tanya Lee Hull and/or Phillip Gene Hull except as the Trustee in its sole discretion deems necessary for the benefit of Phillip Lee Hull..

B. The sum of $8,164,063.87 plus interest calculated at 6.26% per annum from October 19, 1990 to date of deposit paid by the United States of America to the Trustee pursuant to the Order and Judgment of the Court, less sums paid in attorney fees, shall constitute the "Trust Estate" and shall be referred to herein as the "Trust Estate". The "Trust Estate" shall remain in existence until the death of Phillip Lee Hull.

C. The "Trust Estate" represents damages on account of personal injuries. This Trust is

not a taxable entity. Neither the Trust nor any person including Phillip Lee Hull is in constructive receipt of the original principal and all interest earned on that original principal. Neither the Trust nor any person has the current economic benefit of the "Trust Estate" from the date of inception or during the lifetime of Phillip Lee Hull.

D. Because this Trust is not a taxable entity and the "Trust Estate" may possibly revert to the United States of America, neither the Trust nor any other person or entity may take or claim any Section 213 of the Internal Revenue Code medical deduction for any taxable year for any Section 213 medical expenses which are paid from the "Trust Estate".

E. The Trustee shall during the lifetime of Phillip Lee Hull, subject to the terms and conditions of this Trust, in its absolute discretion, pay so much of the "Trust Estate" for the benefit of Phillip Lee Hull as the Trustee in its absolute discretion may deem appropriate.

F. In the exercise of its discretion, the Trustee will consider the Court's Amended Findings of Fact and Conclusions of Law. A copy of the Court's Amended Findings of Fact and Conclusions of Law is attached to and made a part of the Trust Agreement.

G. The Trustee is not required to furnish the specific extraordinary medical services and supports detailed in the Court's Order if the Trustee, in its discretion, determines that such medical services and supports may be performed by Phillip Lee Hull's mother and/or father or third parties after completion of necessary training, at lesser or

more expensive hourly rates. The Trustee may use the Court's Order to anticipate some of the needs which may arise because of Phillip Lee Hull's physical condition. However, the Trustee will be guided in the exercise of its discretion by the fact that this "Trust Estate" is for the benefit of Phillip Lee Hull. The Trustee shall do nothing to deliberately try to conserve any portion of this "Trust Estate" for any third person.

H. The Trustee may employ a case management-type consultant to assist the Trustee in its administration of this Trust. Phillip Gene Hull and/or Tanya Lee Hull shall satisfy themselves as to the reasonableness and the necessity of all treatment recommended by the Trustee and its consultant and agree that upon making that determination, they will sign any consent for treatment required by the provider of that treatment. Phillip Gene Hull and Tanya Lee Hull agree to meet with the Trustee and/or its consultant in their home to allow the Trustee and its consultant reasonable access to Phillip Lee Hull. Phillip Gene Hull and Tanya Lee Hull further agree to advise the Trustee and its consultant of any substantial change in the condition of Phillip Lee Hull upon the occurrence of change of conditions.

I. This Trust shall terminate upon the death of Phillip Lee Hull. Upon the death of Phillip Lee Hull the Trustee shall pay all the outstanding obligations of the Trust and distribute the remaining "Trust Estate" in the following manner:

(l) If Phillip Lee Hull has been institutionalized, but is living in a home environment provided for and occupied by his father, Phillip Gene Hull,and/or mother Tanya Lee Hull, and he is

survived by his father, Phillip Gene Hull, and his mother, Tanya Lee Hull, Trustee shall distribute to each parent one-half of the then remaining "Trust Estate". If one parent is deceased, Trustee shall distribute to the sole surviving parent all of the then remaining "Trust Estate".

(2) If Phillip Lee Hull is survived by his father, Phillip Gene Hull, and his mother, Tanya Lee Hull, and has been institutionalized, that percentage of the remaining "Trust Estate" on the date of death of Phillip Lee Hull arrived at by dividing Phillip Lee Hull's age on the date of his institutionalization by 69.8, that being his life expectancy on the date of trial, shall be distributed by the Trustee, one-half to Phillip Lee Hull's mother, Tanya Lee Hull, and one-half to Phillip Lee Hull's father, Phillip Gene Hull. If one parent is deceased, this entire percentage of the "Trust Estate" shall be distributed by the Trustee to the sole surviving parent. The remaining percentage of the "Trust Estate" shall revert to the United States of America and shall be distributed to the United States of America by the Trustee.

(3) If Phillip Lee Hull is not survived by a parent and has not been institutionalized, the entire "Trust Estate" shall be distributed pursuant to the terms and conditions of the Last Will and Testament of Phillip Lee Hull. If Phillip Lee Hull should die intestate the entire "Trust Estate" shall be distributed to his heirs pursuant to the laws of descent and distribution of the State of Oklahoma.

(4) If Phillip Lee Hull is not survived by a parent and has been institutionalized, that

percentage of the remaining "Trust Estate" arrived at by dividing Phillip Lee Hull's age on the date of his institutionalization by 69.8, that being his life expectancy on the date of trial, shall be distributed by the Trustee pursuant to the terms and conditions of the Last Will and Testament of Phillip Lee Hull or to his heirs pursuant to the laws of descent and distribution of the State of Oklahoma if he should die intestate. The remaining percentage of the "Trust Estate" shall revert to the United States of America and shall be distributed to the United States of America by the Trustee.

J. If Phillip Lee Hull is survived by one or both parents, the distribution from the "Trust Estate" shall be the final distribution of the damages awarded by the Court to the family and shall not be income to the family or subject to estate taxes. If Phillip Lee HULL is not survived by a parent, that distribution will be a distribution of Phillip Lee Hull's estate assets subject to estate taxes.

K. No person is entitled to any fixed indefeasible future interest in the "Trust Estate". No party shall have any power to anticipate, assign, transfer, sell, encumber, or otherwise dispose of any interest in whole or in part in and to the "Trust Estate". The interest of Phillip Lee Hull shall not be subject to any claim of any creditor of any person except such debt as may have been incurred by the Trustee of this Trust.

L. The Trustee is specifically authorized to purchase, in the name of the Trust, a suitable home to allow for the in-home care of Phillip Lee Hull. The Trustee is further authorized to pay all expenses incidental to the maintenance of that home including insurance, utilities and

taxes.

M. The Trustee is specifically authorized to purchase, in the name of the Trust or in the name of others in the discretion of the Trustee, any vehicle which it deems necessary and to pay all expenses incidental thereto. The Trustee is specifically authorized to maintain insurance, including liability coverage, on that vehicle.

N. The Trustee is authorized to maintain any insurance that it deems necessary for the benefit or interest of Phillip Lee Hull except for life insurance. The Trustee is not authorized to purchase life insurance on the life of Phillip Lee Hull.

O. The Trustee shall have the right to sell items purchased in the name of the Trust, on such terms and conditions as the Trustee, in its sole discretion may determine to be in the best interest of the "Trust Estate". The Trustee may deliver good title to any purchaser for value without inquiry of the purchaser as to the use of the proceeds from that sale.

P. Other than as specifically provided by this Trust Agreement, the Trustee is authorized to invest the "Trust Estate" only in direct obligations issued by the United States Treasury such as Treasury Bills, Notes, or Bonds. The Trustee is permitted to maintain saving and checking accounts at normal rates of interest, which together shall not total more than $100,000.00 on any given date.

Q. Any successor of or to the Trustee shall succeed the Trustee herein, whether through sale or transfer of the Trustee's business or its Trust Department, merger with another entity, resignation of the Trustee, or by appointment. The successor Trustee shall possess the powers

and be governed by the terms and conditions of this Trust to the same extent and to the same effect as if that successor Trustee were the original named Trustee of this "Trust Estate". If the Trustee resigns or the permanent residence of Phillip Lee Hull is moved to a location more than 120 miles from Tulsa, Oklahoma, the Honorable James 0. Ellison, United States District Judge for the Northern District of Oklahoma or his successor to that office, shall have the power to appoint the successor Trustee and shall also have the right to change the method of compensating the Trustee with the agreement of the 'Trustee. The successor Trustee must be a corporate Trustee with assets under management in an amount not less than the amount of assets under management by Trustee on the date of that appointment.

R. Except as limited by this Trust Document, the Trustee shall possess those powers set forth in Title 60, Section 175.24 of the Oklahoma Statutes. The Trustee shall be entitled to reasonable compensation based upon a reasonable hourly rate for the hours reasonably expended in performing the duties of Trustee. The Trustee shall not be entitled to be compensated on a percentage basis based upon the size of the Trust.

S. Phillip Gene Hull and/or Tanya Lee Hull specifically agree that the Honorable James 0. Ellison, United States District Judge for the Northern District of Oklahoma or his successor to that office, shall retain limited jurisdiction in this case. Such limited jurisdiction shall be to possess those powers specified in this Trust Agreement as follows:

(l) Phillip Gene Hull and/or Tanya Lee Hull

shall allow the Court, at its request, to visit with Phillip Lee Hull in their residence.

(2) Phillip Gene Hull and/or Tanya Lee Hull further agree that in the event of a disagreement between the Hulls and the Trustee as to the care that Phillip Lee Hull is receiving or is recommended to receive, and resolution of that disagreement cannot be obtained, such disagreement will be submitted to the Court for the Court's decision. Both the parents and the Trustee agree to be bound by the Court's decision.

(3) Phillip Gene Hull and Tanya Lee Hull and the Trustee specifically agree that the Court retains the power to remove the Trustee, for cause, upon the Court's own initiative or upon a proper showing by the parents.

(4) Phillip Gene Hull and Tanya Lee Hull and the Trustee further agree that the Trustee shall render an annual accounting to the Court of the financial condition of the Trust.

(5) An annual Trustee's report shall be furnished to the Court concerning the overall status of Phillip Lee Hull. The Court may specify from time to time the content of this required report.

(6) The parties further agree that in the event that any situation arises that the Trustee and/or the parents do not feel is adequately covered by the Trust document, either of these parties may ask the Court for clarification or directions. The parties do not intend this provision to establish in the Court any on-going or continuing discretion in the day-to-day management of the Trust. Discretion in the day-to-day management of the Trust has been vested in the Trustee

selected by the Court.

13. The Court has awarded a lump sum together with interest on that lump sum based upon investments only in direct obligations of the United States Treasury which will not allow for potential speculative growth to the '"Trust Estate", but does provide for a certainty in amount of the total damage award. This award carries with it an inherent risk of undercompensation. The expenses incurred may well exceed those contemplated by the Order of the Court and Phillip Lee Hull may live beyond his normal life expectancy. The financial consequences of the death of Phillip Lee Hull prior to the consumption of the "Trust Estate" would not, therefore, be a financial windfall to the parents of Phillip Lee Hull if they survive the death of Phillip Lee Hull, since they have assumed the substantial risk of having to cover the expenses of Phillip Lee Hull if he outlived the amount available pursuant to this damage award. Further, any sums remaining in the "Trust Estate" at the death of Phillip Lee Hull would certainly be enhanced to the extent that Phillip Lee Hull's father, Phillip Gene Hull, and mother, Tanya Lee Hull, personally performed services for the benefit of Phillip Lee Hull during his lifetime. If Phillip Lee Hull is institutionalized, however, a potential windfall would be realized by the father, Phillip Gene Hull, and mother, Tanya Lee Hull, of Phillip Lee Hull in the event of his death during their lifetime because of a differential in the cost of institutional care as opposed to home care and further as a result of the potential reduced life expectancy as the result of that institutionalization. As used herein and as to be used in the Trust Document, institutional means any custodial arrangement outside the home. The Trust shall provide that the Trustee distribute the "Trust Estate"

upon the death of Phillip Lee Hull in the manner described supra.

14. The Court further finds that if Phillip Lee Hull is survived by parents, the distribution from the "Trust Estate" shall be the final distribution of the damages awarded by the Court to the family and shall not be income to the family or subject to estate taxes. If Phillip Lee Hull is not survived by a parent, then in that event the amount distributed upon the death of Phillip Lee Hull which could be subject to his will and which would be his estate would not be a distribution of the damages award, that distribution would be Phillip Lee Hull's estate asset subject to estate taxes.
15. The Trustee shall render an annual accounting to the mother, Tanya Lee Hull, and/or father, Phillip Gene Hull, of Phillip Lee Hull and to Phillip Lee Hull upon his obtaining his majority. If it is determined upon his obtaining majority that Phillip Lee Hull is not competent, the Trustee shall furnish the annual accounting to Phillip Lee Hull's next of kin on behalf of Phillip Lee Hull.
16. The Trustee to be empowered by the Trust Origination Documents has been approved by the Court and is designated as Fourth National Bank of Tulsa. The Trustee shall retain one-half of the total award and shall deliver one-fourth of the total award to F & M Bank and Trust Company and one-fourth of the total award to Bank of Oklahoma, N.A. Those Banks will serve as agents for the Trustee and will invest all of those funds in direct obligations issued by the United States Treasury such as Treasury Bill, Notes, or Bonds. Each of those Banks shall render such accountings as requested by the Trustee for annual inclusion within the Trustee's report to the Court. The Trustee from the original one-half of the Trust Estate which it retains shall pay all attorneys'

fees which are due and payable to Stephen C. Wolfe, all Plaintiffs' costs and expenses and shall further reimburse Stephen Wolfe for any and all expenses advanced by Stephen Wolfe to or for the benefit of Phillip Lee Hull. After those payments are made, the Trustee shall cause all future and necessary expenditures to be made from the total assets of the Trust in such a manner that the amount of money held by the Trustee, F & M Bank and Trust Company and Bank of Oklahoma, N.A. shall be reasonably equal in value, adjustments to be made at least bi-annually, each possessing approximately onethird of the total value of the Trust Estate. The Trustee shall from the Trust Estate cause the reasonable fees on an hourly basis to be paid to F & M Bank and Trust Company and Bank of Oklahoma, N.A. for the services they render as repository agents for the Trustee in this regard. Although the Court is firmly convinced that a structured settlement would be in the best interests of both parties, under the prevailing law, the Court cannot order such a settlement. The Trust will not be reversionary in the event of Lee Hull's early and untimely death, but is directed by the Court to revert to the United States should Lee ever be placed in an institutional environment. This reversion is to be calculated by subtracting from the total Trust Estate remaining at the time of institutionalization, the cost of Lee's institutional care from that year until he reaches the age of 69.8 years. For example, should Lee be institutionalized at the age of 20, the reversion would be calculated by subtracting from the total Trust Estate the cost of institutional care for 49.8 years. See Reilly v. United States, 665 F.Supp. 976 (D.R.I. 1987)

17. The amended judgment rendered herein does not alter the amount delineated by the Court in its

original judgment of October 19, 1990. From that date the total amount of damages has been fixed, certain and final, and was accordingly filed of record with the United States Government Accounting Office by Plaintiff's counsel on October 23, 1990. Therefore, the Court orders that interest should be paid on the total damage award in the amount of 6.26% from October 23, 1990 to date of deposit by Defendant. See Federal Deposit Ins. Corp. v. Rocket Oil Co., 865 F.2d 1158 (lOth Cir. 1989); United States v. 85.11 Acres of Land. Etc., 243 F.Supp. 423 (N.D. Okla. 1965); Tune v. Peabody Coal Co., 772 P.2d 927 (Okl. App. 1989); Nunn v. Stewart, 756 P.2d 6 (Okl. 1988).

18. The Court orders that the amount of attorneys' fees contractually required by the arrangements between Plaintiffs and their counsel be paid from the total damage award. Plaintiffs' counsel are directed to pay from that sum the fees and costs expended by Plaintiffs' trust expert at the hearing. The attorney fees for the Guardian Ad Litem and the fees and costs for the Guardian Ad Litem's trust expert are to be paid by the Defendant.

IT IS THEREFORE ORDERED that, liability having been admitted by Defendant United States of America, total recovery by Plaintiffs Lee Hull, Tanya Hull and Phillip Hull is $8,414,063.87 as set forth above. The amounts designated for Tanya and Phillip HULL may be paid to them via the channels normally designated for successful plaintiffs in personal injury actions. The Court finds that the sums payable to Lee Hull, however, must be placed in a trust fund on behalf of Lee Hull. The Trustee to be empowered by the Trust Origination Documents has been approved by the Court and is delineated as Fourth National Bank of Tulsa, with F & M Bank and Trust Company and Bank of Oklahoma, N.A. as agents as specified, supra. The

Trust will not be reversionary in the event of Lee Hull's early and untimely death, but is directed by the Court to revert to the United States via the formula indicated should Lee ever be placed in an institutional environment. The amended judgment rendered herein does not alter the amount delineated by the Court in its original judgment of October 19, 1990. From that date the total amount of damages has been fixed, certain and final, and was accordingly filed of record with the United States Government Accounting Office by Plaintiff's counsel on October 23, 1990. Therefore, the Court orders that interest should be paid on the total damage award in the amount of 6.26% from October 23, 1990 to date of deposit by Defendant. The Court orders that the amount of attorneys' fees contractually required by the arrangements between Plaintiffs and their counsel be paid from the total damage award. Plaintiffs' counsel are directed to pay from that sum the fees and costs expended by Plaintiffs' trust expert at the hearing. The attorney fees for the Guardian Ad Litem and the fees and costs for the Guardian Ad Litem's trust expert are to be paid by the Defendant.

ORDERED this 11th day of April, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

Supreme Court, U.S.
FILED
MAR 26 1993
OFFICE OF THE CLERK

No. 92-1237

In the Supreme Court of the United States

OCTOBER TERM, 1992

PHILLIP LEE HULL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
BARBARA C. BIDDLE
WILLIAM G. COLE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

In this case, an injured minor recovered against the government under the Federal Tort Claims Act. The question presented is whether the court of appeals correctly held that the district court can order an award in the form of a trust that will revert to the government upon the death of the minor, when the minor requests such an award through his legal representative and the district court finds that such an award would be in the minor's best interest.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 971 F.2d 1499. The first opinion of the district court (Pet. App. A29-A49) is unreported. The unreported opinion of the district court on remand is reproduced for the convenience of the Court in an appendix, *infra*, 1a-6a.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1992. A petition for rehearing was denied on October 22, 1992. Pet. App. A27. The petition for a writ of certiorari was filed on January 19, 1993. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Phillip Lee Hull (Lee) was born on June 28, 1987, at Claremore Public Health Service Indian Hospital in Claremore, Oklahoma. As a result of government negligence before and during his delivery, Lee suffered brain damage and other injuries. Lee's parents (the Hulls) brought suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. The government conceded liability, and the case proceeded to trial on the issue of damages. After a two-week trial, the district court awarded Lee $8,164,063.87. With the Hulls' agreement, the court ordered that Lee's damages be paid directly to a third-party trustee for Lee's benefit during his lifetime. The court also awarded a total of $250,000 to the Hulls. Pet. App. A3-A5, A29.

b. On the government's motion, the district court had appointed a guardian ad litem early in the litigation "so as to protect Phillip Lee Hull during the pendency of this action." Gov't C.A. Reply Br. 2 (quoting district court order). The court expressed concern that Lee's safety would be in jeopardy if the Hulls stood to receive the unspent portion of Lee's award upon his death. See Pet. App. A4, A7. The district court stated that "the real issue here is what is [in] the best interest of Phillip Lee Hull. If I had the power I would make every dollar awarded reversionary [to the government upon Lee's death]." Gov't C.A. App. 177A. The court did not create such a

reversionary trust, however, because it concluded that it lacked the authority to do so. Pet. App. A6-A7.

2. Although in the district court the government had not requested that the award be structured in any particular way, on appeal the government argued that the district court had the power to create a fully reversionary trust for Lee.[1] Lee's guardian ad litem supported the government's position that a fully reversionary trust was in Lee's best interest. See Pet. App. A6; Lee C.A. Br. 8-12.[2] In the court of appeals, Lee's legal representative reiterated her belief that "if the full trust comes to the parents of Phillip Lee Hull upon his death, * * * his life would be in serious jeopardy." Lee C.A. Br. 8.[3] The court of appeals noted that "the district judge apparently shared this concern." Pet. App. A6. The court of appeals found, however, that the award ordered by the district court "would not provide an incentive against Lee's untimely death while in the care of his parents," because "the entire remaining amount of the

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[1] The appeal also involved several other issues, none of which is presented in the petition for a writ of certiorari.

[2] "Lee C.A. Br." refers to the brief filed on Lee's behalf in the court of appeals by Judith A. Finn, who was appointed by the district court as Lee's guardian ad litem.

[3] The guardian ad litem supported her conclusion with sealed affidavits, which the district court found "raise[d] serious concerns as to the welfare of Phillip Lee Hull." Gov't C.A. Reply Br. 3 n.2 (quoting statement of district judge in open court). Although the court ultimately found it unnecessary to rely on the affidavits, the informed judgment of the guardian ad litem was properly taken into account by the court of appeals. See *ibid.*

damage award would go to the parents." Pet. App. A5 n.2.

As the court of appeals put it, "it would be incongruous for the recovery to place the victim's life in jeopardy." Pet. App. A9.[4] The court therefore concluded that the district court had the authority to approve an award whereby Lee's damages would be paid into a trust that would revert to the United States upon Lee's death. Pet. App. A10. The court of appeals vacated the judgment of the district court and remanded the case to allow the district court to consider whether such a trust would be in Lee's best interest. *Ibid.* This petition is from that decision of the court of appeals.

3. On remand, the district court imposed a trust identical to the one to which the Hulls had earlier agreed, with the exception that upon Lee's death any remaining funds will revert to the government rather than being paid to the Hulls. See App., *infra*, 3a.[5] The district court stated that "[t]he Trust * * * will be fully reversionary pursuant to 28 U.S.C. §1346

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[4] The government does not suggest or imply that the Hulls would intentionally harm Lee. The accident left Lee a spastic quadriplegic, however, and he will require extensive medical attention for the rest of his life. See Pet. App. A30-A31; Gov't C.A. Br. 3. Caring for such a child would strain many families, and the availability in the event of Lee's death of more than $8 million to the Hulls (who have experienced serious marital and alcohol problems) may produce conflicting pressures that could lead to less than optimal care for Lee. See Gov't C.A. Br. 12.

[5] The district court's decision was filed on February 16, 1993 (see App., *infra*, 1a), after the petition was filed in this Court.

because this Court specifically finds that arrangement will be in Lee Hull's best interest." *Ibid.*

ARGUMENT

1. Regardless of the merits of the question presented, this case does not warrant review for two independent reasons.

a. The petition names Phillip Lee Hull as the petitioner. See Pet. ii (List of Parties). Lee, however, has been represented by a guardian ad litem throughout this litigation. See Gov't C.A. Reply Br. 1 n.1. The guardian ad litem was a party to the action in the court of appeals and supported the government's position on the question presented in this petition. See Pet. App. A6. As the court of appeals recognized: "Lee agreed through his legal representative that it would be in his best interest for the government to place his damages, which totalled over eight million dollars, into a fully reversionary trust; in fact, he requested such an arrangement through his legal representative." Pet. App. A11. Because Lee was not aggrieved by the decision below, he should not be considered the petitioner in this Court. Cf. *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) ("the successful party below has no standing to appeal").

In the courts below, the Hulls opposed both the government and Lee's legal representative as to the form of the trust.[6] While it is true that "any party"

[6] The structure of his damage award is a matter between Lee and the government. Although the issue was not raised in the court of appeals, it is therefore questionable whether the Hulls even had standing to contest the form of Lee's award.

may file a petition for a writ of certiorari (28 U.S.C. 1254(1)), the Hulls' only interest in the form of the trust is their access to the money if Lee dies before the damage award is spent. The Hulls have been fully compensated for their own injuries. As the court of appeals correctly stated, "[t]he [challenged] award is to compensate Lee, and Lee only. Thus, the possibility that [the Hulls] might succeed to Lee's award is not relevant." Pet. App. A10. This Court should decline to consider the Hulls' request to review the disposition of property in which they have at most a contingent future interest,[7] particularly where (as here) the real party in interest with respect to the property has agreed to the challenged disposition.

b. In any event, the Hulls' contention (Pet. 5-11) that the court of appeals erred in concluding that the district court had authority to create a reversionary trust for Lee's benefit is not ripe for review. As the Hulls recognize, the trust originally created by the district court "[did] not contain a provision which [would cause] a reversion to the Government upon the death of Lee Hull." Pet. 4 n.1. While the district court recently approved a reversionary trust, that judgment is not final and appeals may still be taken. Following the disposition of any further appeals, it is possible that the Hulls will be satisfied with the outcome or that they will have other claims to raise.

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[7] The district court has since divested the Hulls of even that interest in the damage award. See App., *infra*, 3a. If they decide to pursue an appeal, the court of appeals should have the opportunity in the first instance to determine whether the Hulls even have standing to object to the form of the trust created for Lee's benefit.

This Court should accordingly follow its usual practice and deny the interlocutory petition for a writ of certiorari. *American Constr. Co.* v. *Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893); see also *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

2. On the merits, the decision below is correct, and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

a. The Hulls erroneously argue (Pet. 6-9) that the decision below conflicts with *Reilly* v. *United States*, 665 F. Supp. 976 (D.R.I. 1987), aff'd in part and rev'd in part on other grounds, 863 F.2d 149 (1st Cir. 1988); *Andrulonis* v. *United States*, 724 F. Supp. 1421 (N.D.N.Y. 1989), aff'd in part and rev'd in part on other grounds, 924 F.2d 1210 (2d Cir.), vacated *sub nom. New York State Dep't of Health* v. *Andrulonis*, 112 S. Ct. 39, reinstated, 952 F.2d 652 (2d Cir. 1991), cert. denied, 112 S. Ct. 2992 (1992); *Frankel* v. *Heym*, 466 F.2d 1226 (3d Cir. 1972); and *Nemmers* v. *United States*, 795 F.2d 628 (7th Cir. 1986). Those cases hold that in making FTCA damage awards, courts are limited to ordering the government to pay a lump-sum judgment.

The court of appeals in this case had no quarrel with the *Frankel* line of cases. See Pet. App. A9 ("We agree that courts cannot subject the government to ongoing obligations like the continuing payments proposed in *Frankel*."). The court simply held that so long as the government "satisfies its *obligation* up

front in one lump sum, nothing in the FTCA prohibits courts from exercising their inherent authority to structure awards or to impose trusts or reverter conditions to ensure that the damage recovery is in the best interest of the victim." *Ibid.* That holding does not conflict with any of the cases cited by the Hulls.

Frankel, which is the "seminal case on this topic" (Pet. App. A8), identified two concerns underlying the lump-sum rule. One is that continuing payments would require continuing judicial supervision. 466 F.2d at 1229. That concern is not implicated in this case: The award included an amount for fund management, see Pet. App. A35, to which the government does not object. The second concern identified in *Frankel* is based on the FTCA's being a waiver of sovereign immunity: "If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them." 466 F.2d at 1229. That concern is also not implicated in this case, because Congress has specifically authorized "money damages" in FTCA cases, see 28 U.S.C. 1346(b), and the United States has consented to the entry of an order establishing a reversionary trust. No sovereign immunity issues are involved if the parties agree, after the government pays the lump sum out of the federal treasury, to structure the award as a reversionary trust (or, for that matter, in any other way).

The court's decision is entirely consistent with the First Circuit's observation that "[a]fter the wrongdoer and its funds have been parted, the focus shifts: it cannot be doubted that the [district court] has the

power (1) to ensure that the recovery benefits the victim, and (2) to exercise strict supervision over investment and use of the funds if the victim is a legal incompetent or otherwise in need of protection." *Reilly*, 863 F.2d at 170. As the court of appeals noted, the Seventh Circuit has in dictum approved reversionary trusts under certain circumstances. See Pet. App. A12 (citing *Nemmers*, 795 F.2d at 636 n.4). Moreover, "[i]n FTCA cases with similar facts, two district courts have imposed trusts granting a reversionary interest to the government with the consent of the real party in interest." Pet. App. A11 (discussing *Robak* v. *United States*, 503 F. Supp. 982 (N.D. Ill. 1980), aff'd in part and reversed in part on other grounds, 658 F.2d 471 (7th Cir. 1981), and *Reilly*, *supra*, 665 F. Supp. 976).

Lee, the injured tort victim, is the real party in interest with respect to the damage award. See Pet. App. A10. As the court of appeals noted, "Lee consented to a fully reversionary trust through his legal representative, the guardian ad litem." *Ibid.* The Hulls object that they, as Lee's parents, should have control over the disposition of the award. See Pet. 9 n.8. The court of appeals properly rejected that contention: "Because the guardian ad litem—and not the parents—represents Lee, [the guardian's] consent is the relevant consideration. The parents' refusal to consent to a fully reversionary trust is irrelevant, particularly in light of their alleged conflict of interest in this case." Pet. App. A11 (citation omitted). The Hulls concede (Pet. 9) that FTCA plaintiffs can agree to the formation of a reversionary trust; because Lee agreed to such a

trust through his legal representative, the Hulls' objection to the form of the award is meritless.

b. The Hulls also state that the decision of the court of appeals "appears to conflict with the prior decisions of this Court." Pet. 10. First, they claim that the court of appeals disregarded this Court's decisions by construing the FTCA to grant courts broad authority to fashion equitable relief. The decisions cited by the Hulls, see Pet. 10-11 (citing *Kosak* v. *United States*, 465 U.S. 848 (1984), and *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955)), however, have no bearing whatsoever on the precise issue in this case: whether the district court has authority to create a reversionary trust where the United States and the victim agree that such a trust is appropriate and desirable. Second, the Hulls erroneously suggest that the award in this case contradicts the principle that the FTCA places the government in a position analogous to that of a private tortfeasor. See Pet. 11 (citing *Feres* v. *United States*, 340 U.S. 135 (1950), and *Dalehite* v. *United States*, 346 U.S. 15 (1953)). They fail to identify, however, any case in which a court of appeals has held that a tort victim could not agree with the tortfeasor to create a reversionary trust, and we have found none.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

BARBARA C. BIDDLE
WILLIAM G. COLE
Attorneys

MARCH 1993

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
OKLAHOMA

No. 88-C-1645-E

PHILLIP LEE HULL, a minor, by his natural parents, guardians and personal representatives, PHILLIP GENE HULL AND TANYA LEE HULL, husband and wife, and PHILLIP GENE HULL, Individually, and TANYA LEE HULL, Individually, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant.

THIRD AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed February 16, 1993

This Third Amended Findings of Fact and Conclusions of Law is entered this 12th day of February, 1993, amends and supersedes the Second Amended Findings of Fact and Conclusions of Law entered herein on the 28th day of October, 1992 in response to the August 10, 1992 mandate of the United States Court of Appeals for the Tenth Circuit. Following the Tenth Circuit remand, the parties have fully briefed and discussed the remaining issues with the Court. The case is now in a posture for resolution of those issues.

In its August 10th Order the Circuit addressed four issues:

> 1. The power of this Court to establish a full reversionary Trust;
>
> 2. The date upon which interest on the award should begin to accrue;
>
> 3. Whether the guardian ad litem's fees are "attorneys fees" (deductible from the award) or costs (taxable to the government);
>
> 4. The appropriateness of certain specific damage awards; to-wit:
>
> > a. economic losses (lost wages, earning capacity; medical treatment; special housing and transportation);
> >
> > b. non-economic losses (loss of enjoyment of life; mental and physical pain; disfigurement; permanent disability);
> >
> > c. parents' loss of services; aid, comfort, society and companionship.

The Court will address each issue *ad seriatim* and, to the extent that its conclusions do not conflict with those of this Order, the Court's April 12, 1991 Order (Amended Findings of Fact and Conclusions of Law) is incorporated herein and made a part hereof.

1. *Form of the Trust*

The Court declines to adopt the government's proposal for a U.S.A./Grantor Trust pursuant to the terms of a structured settlement. Absent the availability of hard figures (*see*, Order of September 9, 1992, at docket #181) the Court is somewhat reticent about concluding that the government's proposal

would work to Lee Hull's net benefit.[1] The Court is also concerned, in these uncertain times, about the long-term reliability of a casualty carrier.[2] The Court will, therefore, affirm its April 12, 1991 Order establishing and [*sic*] irrevocable Trust for Lee Hull under the provisions set forth therein; provided, however, that the Trust shall be fully reversionary upon the death of Lee Hull. The Trust, then, will be fully reversionary pursuant to 28 U.S.C. §1346 because this Court specifically finds that arrangement will be in Lee Hull's best interest.

The Circuit also asks the Court upon remand to consider 1) whether minor changes in the Trust might dissipate any tension between Lee Hull's interests and those of his parents; 2) whether there should be a provision of reimbursement to the Indian

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[1] See, e.g., The government's submission of Information Regarding Advantages of a Structured Settlement, docket #187, especially, M. Feldheim's article at p. 296:

> Knowledge of cost is essential not just for fee calculation purposes but to ensure that the settlement is reasonable under the circumstances so as to avoid any possible claim of legal malpractice. This is particularly true where claims on behalf of minors and decedents' estates require court approval. The present value or cost is a critical fact that any court approving a compromise should know.

[2] See, e.g. The Government's Submission, docket 187, especially the article entitled "Structured Settlements: An Ounce of Prevention: Some Dos and Don'ts" from *Trial*, December 1988:

> The number-one "don't" is don't rely on the annuity company in a settlement like this. No matter how large and solid the company, if Fly-By-Night Leasing owns the annuity, your client is at the mercy of Fly-By-Night. If you cannot rely on the defendant or its casualty carrier, not just now but into the distant future, never settle a case like this on a structured basis.

Health Service for services rendered to Lee in the future; and 3) whether a new guardian ad litem should be appointed. The Court has considered these issues and now finds that:

1. Parents aver no tension exists between the respective interests; therefore no accommodation needs to be made;

2. In light of the history of this case, the Court does not feel that Plaintiffs should be required to use the Indian Health Services;

3. Pursuant to the terms of the Trust no guardian ad litem is required.

2. *Accrual of Interest*

The Circuit found that this Court's Nunc Pro Tunc Order of June 5, 1991 was the first document to satisfy the final judgment requirements of Rule 58 Fed.R.Civ.P. Post judgment interest, then, accrues from that date at the rate of 6.09% per annum to the date of deposit by the government to Fourth National Bank of Tulsa as Trustee.

3. *Guardian Ad Litem Fees*

The Court has reviewed the records and has determined that the services of the Guardian ad litem in this litigation primarily involved looking after the interests of Lee Hull (indeed, that was the purpose of the appointment from its inception); therefore her services as an officer of this Court should be taxed as costs against the government pursuant to Rule 54(d) Fed.R.Civ.P.

4. *Specific Items of Damages*

A. *Life Expectancy:*

The Court agrees that a scrivner's [*sic*] error appears at Finding No. 11, pp. 3-4 of the Court's April 12, 1991 Order and hereby specifically finds that Lee Hull's life expectancy is 72.8 years.

B. *Discount Rate*

No discount rate should be applied to medical services and equipment or to lost wages damages. (See attached affidavit of Dr. Roger Bey regarding the investment provisions of the Guardian ad litem's Proposed Trust Document at docket #186). Further, while any differential between the investment rate and the inflation rate could support a finding favoring application of a discount rate, it is this Court's view that when the impact of future taxes if [*sic*] factored in, no differential is likely to exist; wherefore parity can be assumed. (*See* Dr. Roger Bey's affidavit, *supra*; *see also Barnes v. United States*, 685 F.2d 66, 78 (3rd Cir. 1982). The Court need not modify its computation in this regard.

C. *Findings Regarding Remaining Damage Claims denied by this Court*:

1) specialized adaptive housing;
2) personal services rendered by Mrs. Hull;
3) housekeeping services required by Lee;
4) lost household services;
5) physical disability and disfigurement;
6) past medical expenses; and
7) dental expenses.

1) no additional award is required for specialized adaptive housing because it was provided for in the awards for medical and life care expenses. *Miller v. United States*, 901 F.2d 894, 896-97 (10th Cir. 1990);
2) Similarly, it would be duplicative to make an additional award to Mrs. Hull whose services are reflected in awards for Lee's care and for Mrs. Hull's pain and suffering;
3) Housekeeping services are likewise covered by awards to provide for Lee's care;

4) The Court finds that household services performed by a child are too speculative to reduce to calculation; therefore the Court declines to make an award for lost household services;
5) Damages for physical disabilities and disfigurement were subsumed within the award for pain and suffering;
6) Plaintiffs have previously been reimbursed for past medical expenses insofar as they made proper application for the same to the Indian Health Service. The record indicates there is no evidence upon which to supplement the previous reimbursements.
7) Provision has been made for future dental expenses in the Court's award for future medical expenses.

The Court adopts the Agreed Statement of Damage Awards submitted on the 30th day of November, 1992 (docket #200). A copy is attached hereto for reference and made a part hereof.

So ORDERED this 12th day of February, 1993.

/S/_____
JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
MAR 26 1993
OFFICE OF THE CLERK

No. 92-1237

In The

Supreme Court of the United States

October Term, 1992

PHILLIP LEE HULL, a minor by his natural parents, guardians, and personal representatives, PHILLIP GENE HULL and TANYA LEE HULL, husband and wife,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JUDITH A. FINN, PH.D., J.D.
907 Philtower Building
427 South Boston
Tulsa, Oklahoma 74103
(918) 583-6414

Guardian ad litem for Phillip Lee Hull

March 26, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. A Writ of Certiorari should be denied because the parents of Phillip Lee Hull are without lease standing to file this Writ.

The Petition for a Writ of Certiorari declares that the Petition is brought by the "natural parents and personal representatives of Phillip Lee Hull," by attorney Stephen C. Wolfe in this action which arose under the Federal Tort Claims Act. 28 U.S.C. §2674. However, the parents of Phillip Lee Hull are without standing to bring this petition to the Court.

The only person with authority to bring this petition is the Guardian ad litem of Phillip Lee Hull, Judith A. Finn. The Guardian ad litem was appointed pursuant to Rule 17(c) of the F.R.Civ.P by the District Court. It is her duty, and hers alone, to represent the legal interests of the minor child, Phillip Lee Hull. The Court of Appeals, in its ruling on the appeal of this case, stated that the Guardian ad litem is the legal representative of Phillip Lee Hull, not the parents, for purposes of this litigation. *Hull by Hull v. U.S.*, 971 F.2d 1499, 1505 (10th Cir. 1992), citing *Garrick v. Weaver*, 888 F.2d 687, 692-93 (10th Cir. 1989).

In *Garrick v. Weaver*, the Court of Appeals for the Tenth Circuit held that a guardian ad litem appointed pursuant to Rule 17(c) is an "other like fiduciary" which would bar the parent from proceeding as next friend for her children on the matter for which the guardian ad litem was appointed. Therefore, the parent had "no standing to raise claims on appeal on behalf of her children." *Id.*, 693. See also *Susan R.M. v. Northeast Indep.*

School Dist., 818 F.2d 455, 458 (5th Cir. 1987), and *Developmental Disabilities Advocacy Center, Inc., v. Melton*, 689 F.2d 281, 285-286 (1st Cir. 1982).

The policy considerations noted by the court include preventing the parents and the guardian ad litem from advocating inconsistent positions on appeal on behalf of the minor child.

> Allowing two parties, the court-appointed guardian ad litem and Garrick, to represent the minor children interferes with the orderly development of the lawsuit because the minor children could take inconsistent positions through their multiple representatives. This case illustrates the problem. The only issue that is contested by the guardian ad litem is Melton's attorneys' fees. The other issues, i.e., the freedom of religion, delayed disbursement, and lack of maintenance claims, would not be a case of controversy if the guardian ad litem were the only party with standing to take positions of the children's behalf because the guardian ad litem is not challenging the magistrate's order with respect to those issues.

Garrick v. Weaver, 693. The analogy to the case at bar is clear. The Guardian ad litem sought a reversionary provision in the trust document to be approved by the District Court. The Tenth Circuit agreed with the Government and the Guardian ad litem that the District Court had the power to approve such provision, upon the consent of the Guardian ad litem for Phillip Lee Hull. On remand, the District Court entered revised Findings of Fact and Conclusions of Law which provided for a reversionary provision in the trust document. Now the parents of Phillip

Lee Hull, in petitioning the Court to overrule the Court of Appeals on the sole issue of a reversionary provision in the trust, have taken a position directly opposed to the position taken by the Guardian ad litem of the minor child. It is exactly this inconsistency that the Court of Appeals anticipated and disallowed in *Garrick v. Weaver*, and which must be disallowed in the case at bar.

In the case at bar, the parents were not parties to the appeal in that they brought no question to the Court of Appeals on their own behalf. The parents of Phillip Lee Hull are, no doubt, the persons most likely to benefit from a non-reversionary trust. Indeed, they make no argument in their Petition that they are acting in the best interests of Phillip Lee Hull. Clearly, it would be difficult to make such an argument, since the lump sum award was made for the care and treatment of Phillip Lee Hull, and if he should die before his projected life expectancy of 72 years, the parents would receive a windfall. The parents' conflict of interest becomes self evident when "an independent neutral guardian ad litem and an impartial judge agree" on what is in the best interest of the minor child, while the parents continue to pursue the hope of inheriting the funds awarded to their son.

Without the attempt by the parents to circumvent the clear purpose of Rule 17(c) of the F.R.Civ.P. and to challenge by this means the position taken by the Guardian ad litem on behalf of Phillip Lee Hull, no case or controversy would exist. Because the parents have no standing to present the Petition for Writ of Certiorari, the Petition should be denied.

II. The Guardian ad litem has not authorized the filing of a Writ of Certiorari.

The Guardian ad litem has sole authority to act on behalf of the minor child in this case, pursuant to Rule 17(c). The federal circuit courts are in agreement that the guardian ad litem is *"appointed as a representative of the court to act for the minor in the cause, with authority to engage counsel, file suit, and to prosecute, control and direct the litigation.* As an officer of the court, the guardian ad litem has full responsibility to assist the court to 'secure a just, speedy and inexpensive determination' of the action." (emphasis added) *Noe v. True*, 507 F.2d 9, 12 (2nd Cir. 1974), citing *Fong Sik Leung v. Dulles*, 226 F.2d 74, 82 (9th Cir. 1955). *Garrick v. Weaver, supra* 693.

Similarly, the Ninth Circuit has emphasized the authority of the guardian ad litem in regard to retention of counsel:

> A guardian ad litem is authorized to act on behalf of his ward and may make all appropriate decisions in the course of specific litigation. For example, notwithstanding the incompetency of a party, the guardian may make binding contracts *for the retention of counsel* and expert witnesses and may settle the claim on behalf of his ward. (emphasis added)

United States v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986).

In the case at bar, the Guardian ad litem has given no authority to other counsel, that is, to Stephen C. Wolfe, to file a petition for Writ of Certiorari on behalf of Phillip Lee Hull. On this ground, the Writ should be denied.

III. No conflict exists between the circuits on the question of whether a district court has the discretionary power to protect its ward by approving or ordering a reversionary provision in a trust document.

The Petition for a Writ of Certiorari suggests that the opinion of the Court of Appeals for the Tenth Circuit conflicts, directly or in principle, with the decisions of the First, Second, Third, and Seventh Circuits. The Petition misconstrues the holdings of these cases.

The Third Circuit has taken no position on the issue of a reversionary provision in a trust plan in the case cited in the Petition, *Frankel v. Heym*, 466 F.2d 1266 (2nd Cir. 1971). The holding in *Frankel* is based solely on the fact that the proposed trust was to be supplemented with additional funds from the United States, "as the court should require." In disapproving of this plan, the court contrasted the supplemental provision of the trust plan with the lump-sum requirement of the Federal Tort Claims Act (FTCA). The opinion is silent as to the trust issue per se and as to the reversion issue specifically, except that the court, in a footnote, speaks with approval of the beneficial function of a reversionary provision.

> The obvious advantage of this arrangement would be to prevent the award, intended as compensation to the injured person, from becoming a windfall to others who would control its use and disbursement.

Id., 1228, fn.1.

The Second Circuit has not ruled on the issue of the court's authority to form a trust under the FTCA, the

discretion of the court to order a reversionary provision in cases involving minor children, or the issue of what constitutes a lump-sum payment by the government in a FTCA case; and thus it cannot be said, as Petitioner states, that the Second Circuit follows the Third Circuit approach. In the district court case on which Petitioner relies, *Andrulonis v. U.S.*, 724 F. Supp. 1421, 1519-1520 (N.D.N.Y. 1989), the court was not faced with the issue of trusts, reversionary or not. The district court cites to the *Frankel* opinion in a footnote, not in a holding of the case:

> Initially it should be noted that the FTCA contemplates a lump sum award, and this Court lacks the power to enter judgment in this case "in terms other than a simple award of money damages," and thus cannot mandate the purchase of an annuity or otherwise structure its award.

This comment is in no way relevant to the case at bar, since the district court did not order the purchase of an annuity, and has specifically rejected any plan to structure the award to the minor child. In the appeal of the *Andrulonis* case to the Court of Appeals for the Second Circuit, the issue of lump sum awards under the FTCA was not raised. *Andrulonis v. U.S.*, 925 F.2d 1210 (2nd Cir. 1991). Thus, the Second Circuit cannot be considered to have "followed" the Third Circuit. Nor can it be said that the Third Circuit has taken a position contrary to that of the Tenth Circuit in *Andrulonis* case. Indeed, the Tenth Circuit noted that there is no "lump sum" issue in this case because the government *is* paying a lump sum.

The Seventh Circuit has either ordered or approved of agreements placing the lump sum award in a reversionary trust in order to assure benefit accrues only to the minor child. In *Robak v. U.S.*, 503 F. Supp. 982, 983 (N.D. Ill. 1980), *aff'd in part and rev'd in part on other grounds*, 658 F.2d 471 (7th Cir. 1981), the parties agreed to a fully reversionary trust, and the court approved it, based on the rationale that "It permits this Court to award funds to fully cover 71.8 years of expenses, without being concerned with the possibility of unjust enrichment in the event that Jennifer enjoys a life span shorter than that projected by the insurance life tables, thereby substantially reducing her maintenance costs to a lesser amount of dollars than the full trust proceeds. " *Id.* In *Nemmers v. U.S.*, 795 F.2d 628, 635-36 (7th Cir. 1986), the parents did not agree to a reversionary trust and no guardian ad litem had been appointed. Thus, the facts are not analogous to the case at bar. The Seventh Circuit has not ruled against trusts, reversionary or not. In fact, in *Nemmers*, the Court noted that if there is a concern about parents abandoning the child or "dipping into the award for their own purposes," the court should appoint a guardian ad litem. The only prohibition in this case is that courts may not *reduce* awards to prevent a windfall to the family. Further, the Court clearly recognized the Court's power to protect its wards by ordering the purchase of an annuity. *Nemmers*, 795 F.2d at 636.

The same rationale was present in First Circuit decisions. In *Reilly v. U.S.*, 665 F. Supp. 976, 1020 (D.C.R.I. 1987), the district court ordered a future care trust with a reversion over the portion "that would otherwise confer a pure windfall upon Heather's heirs in the event of

Heather's institutionalization before the year 2026." On appeal, the First Circuit, in rejecting the government's attempt to fashion a structured payout of damages, spoke with approval of the Court's order to place the damage award in a trust, in order to protect the interests of the minor child. The First Circuit agreed with the Seventh Circuit regarding the Court's powers to protect its ward:

> After the wrong doer and its funds have been parted, the focus shifts: it cannot be doubted that the Court has power (1) to ensure that the recovery benefits the victim, and (2) to exercise strict supervision over investment and use of the funds if the victim is in a legal incompetent or otherwise in need of protection.

Reilly v. U.S., 863 F.2d 149, 169, 170 (1st Cir. 1988). *Accord, Friends for All Children v. Lockheed Aircraft*, 563 F. Supp. 552, 557 (D.C.D.C. 1983), and *Wheeler Tarpeh-Doe v. U.S.*, 771 F. Supp. 427 (D.C.D.C. 1991), where the courts approved trusts on behalf of minor litigants.

Because the petition has shown no conflict between the federal circuits on the issue decided by the Tenth Circuit, and because, in fact, complete harmony exists among the federal circuits, that, as long as the damages are awarded in a lump sum, the district courts have the inherent power to protect the interests of their wards in a variety of ways, such as approving of or ordering trust arrangements, the Petition for Writ of Certiorari should be denied on this ground as well.

IV. The courts have an inherent duty to see that the rights of a minor child are protected.

The inherent power of the Court to approve the recommendation of the Guardian ad litem regarding the formation of and provisions in a trust document for a minor child is not at issue among the federal courts. They agree that the courts have this power, and they agree that this power comes from the fact that a minor child is a ward of the court.

> An infant party to an action is the ward of the court and it is the court's duty to see that the infant's rights are protected. This is particularly true whenever the property rights of an infant are involved in litigation.

United States v. E. I. duPont de Demours & Co., et al., 13 F.R.D. 98, 104 (N.D. Ill. 1952).

> The infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done him.

duPont, III v. Southern National Bank of Houston, Texas, 771 F.2d 874, 882 (5th Cir. 1985), quoting *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 725 F.2d 1392, 1400 (D.C. Cir. 1984). *Reilly v. U.S.*, 863 F.2d 149, 169-170 (1st Cir. 1988).

In *Friends for All Children v. Lockheed Aircraft*, 563 F. Supp. at 557, the court approved a trust to be set up for minor children, upon the recommendation of guardians ad litem and in spite of objections by some adoptive parents. There the court stated that it had a duty to protect the interests of minor children who were litigants:

> In creating and retaining general supervision over a central trust in this case, therefore, the Court is relying on its undisputed jurisdiction over the original litigation, its responsibility under Rule 17(c) to safeguard the interests of infant litigant who appear before it.

No court has refused to set up a trust for a minor child when either the parents or the guardian ad litem have so requested, and no court has suggested that a reversionary provision in such a trust violates the spirit or letter of the FTCA.

V. The opinion of the Tenth Circuit does not conflict with prior decisions of this Court, nor does it create a new remedy.

The Petition for Writ of Certiorari states that the Tenth Circuit opinion invents a new remedy, "a remedy that is not available to defendants in private tort actions," and a remedy which does not advance the purposes of the Federal Tort Claims Act. No new remedy has been created by the Tenth Circuit. The Tenth Circuit held that "the district court has the inherent authority to order that Lee's damages be paid in the form of a fully reversionary trust if it concludes that it is in Lee's best interest, so long as the government's obligation to Lee ceases when it pays a fixed lump sum to fund that trust." This holding is based on two long-standing, well-established legal principles, which are consistent with holdings of federal courts at all levels. First, it is based on the Court's *inherent* power to make orders as to the disposition and protection of funds of a minor child, to the extent needed to protect

the child's best interest. Second, the holding acknowledges the requirement under the FTCA that the government is to pay a fixed lump sum, and the government's obligation to the minor child must cease when it pays a fixed lump sum.

Neither of these principles contradicts any portion of either of the two cases cited in the Petition in support of the proposition that the Tenth Circuit has created a new remedy. In *Feres v. United States*, 340 U.S. 135, 139, 71 S. Ct. 153, 156, 95 L. Ed. 152 (1950), the Supreme Court stated:

> This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and *equitable* whole. (emphasis added)

In *Dalehite v. United States*, 346 U.S. 15, 31, 73 S. Ct. 956, 965, 97 L. Ed. 1427 (1953), the Supreme Court restated the maxim that while the United States is liable in the same manner and to the same extent as a private individual under like circumstances, the right to sue comes from Congress; and individuals suing under the FTCA must take that right subject to such restrictions as have been imposed. Thus, the right to sue under the FTCA is not unqualified. Nothing in these cases contradicts or is inconsistent with the holding of the Court of Appeals for the Tenth Circuit.

The Petition for Writ of Certiorari should be denied for failure to establish that the opinion of the Tenth Circuit conflicts with prior decisions of this Court, and for failure to prove that it creates a new remedy.

VI. The Petition does not establish either in law or in fact that the opinion of the Tenth Circuit raises important and unresolved problems.

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955), the case cited in the Petition to support the proposition that the opinion of the Tenth Circuit raised special and important issues requiring the granting of the Petition, the Court was referring to cases which are totally unlike the case at bar. In fact the *Sioux City* case involved a dismissal of a Petition for Writ of Certiorari. Nothing is "special or important" about the case at bar except that the minor child needs to receive his funds as soon as possible so that his chances for a long and full life are enhanced. As shown above, no federal question "of substance" has been raised, nor is there any conflict with applicable decisions of this Court. The case herein does not present "an intellectually interesting and solid problem." In fact, none of the appropriate criteria for granting a Writ of Certiorari exist in the case at bar. As the court stated in *Sioux City*, the "Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Id.* The Petition for Writ in this case transparently seeks the benefit of non-litigants.

Because the Petition satisfies none of the prerequisites established by the Supreme Court for granting petitions for writ of certiorari, and because the law and the facts of the case at bar have not been accurately represented to the Court, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied for the reasons that Petitioners lack standing and because the cases they cite do not establish a conflict among the Circuits on the issue of the authority of the courts to order or approve a reversionary trust. Further, no other valid reason has been offered in support of granting this Petition.

In addition, the Guardian ad litem should be granted just damages and double costs on behalf of the minor child, pursuant to Rule 42.2 of the Supreme Court Rules, because the Petition is frivolous and unfounded in law and fact, and because the delay caused by the filing of this Petition unreasonably delays the award of damages to the minor child. The evidence adduced at trial clearly established that unless Phillip Lee Hull receives proper therapy, therapy equipment, and highly specialized treatment during his early childhood years, his award of damages in this action will be of greatly diminished value to him. Delay in receiving the benefit of his damage award delays the many specialized services which the district court determined that he needs immediately. Relief delayed is relief denied. For the parents of Phillip Lee Hull to delay this opportunity in order to obtain the benefit of his funds upon his death is unconscionable.

Respectfully submitted,

JUDITH A. FINN, Ph.D., J.D.
907 Philtower Building
427 S. Boston Ave.
Tulsa, Oklahoma 74103
(918) 583-6414

Guardian ad litem for
Phillip Lee Hull

March 26, 1993